

Of Doubt and Diversity: The Future of Affirmative Action in Higher Education

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The jurisprudence of affirmative action in higher education has been plagued by ambivalence and ambiguity. In 1978, the United States Supreme Court tried to quell the controversy over race-conscious admissions in the Bakke case. The Justices' decision permitted institutions of higher education to continue their admissions practices, but the fragmented opinions hardly quieted critics of affirmative action. In the 1980s and 1990s, the debate only intensified, and lower federal courts began to reach strikingly different conclusions about the constitutionality of considering race and ethnicity to achieve diversity in the student body. In 2003, the Court finally returned to these issues in lawsuits challenging undergraduate and law school admissions at the University of Michigan. When the Court agreed to hear the cases, friends and foes of affirmative action alike hoped for a decisive victory. Yet, neither side achieved complete vindication. Instead, civil rights advocates were buoyed by the Court's conclusion that diversity can be a compelling interest, while proponents of colorblindness emphasized the requirements for narrow tailoring of race-conscious practices. Despite the Michigan decisions, disputes over affirmative action in higher education continue largely unabated. The profound challenge that remains is to convert ambivalence and ambiguity into a shared aspiration for racial justice. Neither bright-line rules nor iconic cases, standing alone, will be up to this task. Instead, the quest must be rooted in a responsive law, one that links concerns about equality to the fundamental precepts of liberty, dignity, and membership.

In 2003, the United States Supreme Court revisited the issue of affirmative action in college and university admissions for the first time since it decided *Regents of the University of California v. Bakke*¹ in 1978. The Court's decisions in the Michigan cases² were closely watched for several reasons. Even at the time *Bakke* was decided, affirmative action was controversial, and the debate only intensified in the 1980s and 1990s.³ The verdict on the legitimacy of the

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¹ *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

² *Grutter v. Bollinger*, 539 U.S. 306 (2003) (upholding law school admissions process); *Gratz v. Bollinger*, 539 U.S. 244 (2003) (invalidating undergraduate admissions process).

³ WILLIAM G. BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS* 13–14

programs still seemed to be out—at least in the court of public opinion. The jurisprudence of affirmative action eventually came to reflect this widespread ambivalence, as the Court struck down programs in areas outside of higher education, such as employment and government contracting.⁴ The Court even cast doubt on the diversity rationale that lay at the heart of *Bakke*, at least where awards of government contracts and licenses were concerned.⁵ At the same time, there was increasing uncertainty about the legacy of *Brown v. Board of Education*,⁶ the landmark 1954 decision that declared state-mandated segregation in public elementary and secondary schools unconstitutional. Long-running desegregation lawsuits were drawing to a close, and schools once again were becoming racially identifiable. Faced with these developments, many wondered whether the Court would retreat from its commitment to diversity in higher education as well. Would the Michigan cases praise *Brown* as they buried it?

When the opinions were handed down, they were simultaneously hailed as an affirmation and assailed as a betrayal of the Court's landmark school desegregation decision. As so often happens, the truth probably lies somewhere in between.⁷ Far from silencing the debate about affirmative action, the Michigan decisions have fueled the controversy. The cases gave civil rights advocates a significant victory by declaring that diversity is a compelling interest and by vindicating some color-conscious government policies. At the same time, the majority made much of the need for narrow tailoring, including an effort to use race-neutral alternatives when they are legitimately available. As a result, colorblindness appears to remain the ideal, and color-conscious practices are simply a concession to hard racial truths about ongoing segregation and stratification. By adopting this approach, the Court has perpetuated much of the ambiguity that surrounded *Brown's* legacy. The Michigan cases reflect a persistent uneasiness about affirmative action, even when programs are justified in the name of equal opportunity. Indeed, the majority of the Court has

(1998); Therese L. Baker & William Vélez, *Access to and Opportunity in Postsecondary Education in the United States: A Review*, 69 SOC. OF EDUC. 82, 85–86 (1996); David Karen, *Changes in Access to Higher Education in the United States: 1980–1992*, 75 SOC. OF EDUC. 191, 194–95 (2002); David Karen, *The Politics of Class, Race, and Gender: Access to Higher Education in the United States, 1960–1986*, 99 AM. J. EDUC. 208, 210, 223–27 (1991) [hereinafter *Politics*]; Gary Orfield, *Public Policy and College Opportunity*, 98 AM. J. EDUC. 317, 319–20 (1990).

⁴ See, e.g., *Adarand Constrs., Inc. v. Peña*, 515 U.S. 200 (1995); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (plurality opinion).

⁵ *Metro Broad., Inc. v. Fed. Comm'n Comm'n*, 497 U.S. 547, 566–69 (1990), *overruled on other grounds by Adarand Constrs., Inc. v. Peña*, 515 U.S. 200 (1995); see *infra* notes 35–38 and accompanying text.

⁶ *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

⁷ Colin S. Diver, *From Equality to Diversity: The Detour from Brown to Grutter*, 2004 U. ILL. L. REV. 691, 694 (2004).

expressed a deep hope that racial preferences will no longer be needed in twenty-five years.⁸

In reflecting on the decisions, Lee Bollinger, former President of the University of Michigan and the lead defendant in the cases, wrote: "My view is that we almost lost what *Brown* had inspired because we did not adequately continue to teach the inspiration. Now the question is the next twenty-five years."⁹ If the Michigan decisions are to serve as a foundation for teaching the inspiration of *Brown*, the normative justifications for affirmative action must be reinvigorated. Despite the Court's own ambivalence, the cases offer preliminary guidance as to how to move beyond formalistic notions of equality that pose an artificial and simplistic choice between colorblindness and racial quotas. On the one hand, colorblindness forces government officials to be indifferent to persistent segregation and stratification unless these harms can be linked directly to intentional wrongdoing. On the other hand, demands for strict racial proportionality disregard a strongly held ethic of individual merit. By adopting a flexible approach to affirmative action that balances competing goals and interests, the Michigan decisions find a middle ground—the space in which to develop a responsive approach to evaluating the diversity rationale. Weaving together concerns about equality, liberty, and membership, the Court reminds us that racial justice is integral to a free society and a healthy democracy.

I. GETTING TO *GRUTTER*

The Michigan decisions can not be understood without tracing the controversies that led up to the litigation. Colleges and universities adopted affirmative action programs in the 1960s in response to civil unrest.¹⁰ Blacks in particular mobilized to demand increased access to higher education. These efforts succeeded in at least two respects. During the 1970s, the total enrollment of nonwhites in institutions of postsecondary education increased; and perhaps more significantly, their enrollment in elite colleges and universities grew.¹¹ As nonwhite enrollments expanded, white applicants began to complain about minority quotas and reverse discrimination, particularly in admission to highly selective institutions.¹² The United States Supreme Court sought to quell this

⁸ *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003).

⁹ Lee C. Bollinger, *A Comment on Grutter and Gratz v. Bollinger*, 103 COLUM. L. REV. 1589, 1595 (2003).

¹⁰ BOWEN & BOK, *supra* note 3, at 5–6; Karen, *Politics*, *supra* note 3, at 224–25; *see generally* JEROME KARABEL, *THE CHOSEN: THE HIDDEN HISTORY OF ADMISSION AND EXCLUSION AT HARVARD, YALE, AND PRINCETON* 378–409 (2005).

¹¹ BOWEN & BOK, *supra* note 3, at 6–9; Karen, *Politics*, *supra* note 3, at 214.

¹² WILLIAM G. BOWEN ET AL., *EQUITY AND EXCELLENCE IN AMERICAN HIGHER*

controversy by addressing the constitutionality of affirmative action in public university admissions.

A. *The Bakke Case*

Allan Bakke had applied to the University of California at Davis Medical School. Despite strong grades and test scores, he was denied admission. According to one authoritative account, Bakke was hurt by his decision to apply late in the process. By the time his interview took place, many of the seats in the entering class were taken. When Bakke reapplied for admission, he had already corresponded with Dr. George Lowrey, the chairman of the admissions committee, about the unconstitutionality of the medical school's affirmative action program. Bakke's second interview with Dr. Lowrey and a student member of the committee did not go well, and as Bakke adopted an increasingly adversarial stance toward the Davis faculty and administration, doubts about the suitability of his temperament grew.¹³ Bakke was rejected for a second time.

Whatever the reasons for the decisions, Bakke blamed racial quotas. Under its special admissions program, the medical school set aside a fixed number of spaces for nonwhite students, who were admitted with substantially lower grades and standardized test scores than were white applicants. Nonwhites competed against each other for their designated seats, while whites competed against each other for the rest of the openings in the class.¹⁴ Bakke argued that this segregated admissions process resulted in reverse discrimination against whites. That is, solely on the basis of race, whites were subject to differential treatment, the very conduct prohibited under equal protection law.¹⁵

After Bakke prevailed before the California courts,¹⁶ the United States Supreme Court agreed to hear the case.¹⁷ *Bakke*¹⁸ sparked deep divisions among the Justices. In school desegregation cases, the federal courts had relied on strict numerical standards to ensure racial balance. School districts had engaged in

EDUCATION 142-44 (2005); BOWEN & BOK, *supra* note 3, at 13.

¹³ BERNARD SCHWARTZ, *BEHIND BAKKE: AFFIRMATIVE ACTION AND THE SUPREME COURT* 5-8 (1988).

¹⁴ *Id.* at 4-5.

¹⁵ *Id.* at 11.

¹⁶ *Bakke v. Regents of the Univ. of Cal.*, 553 P.2d 1152 (Cal. 1976); SCHWARTZ, *supra* note 13, at 17-25.

¹⁷ *Regents of the Univ. of Cal. v. Bakke*, 429 U.S. 1090 (1977). The Court had previously declined to grant certiorari in a case that challenged affirmative action in law school admissions at the University of Washington. *DeFunis v. Odegaard*, 416 U.S. 312 (1974). In both *DeFunis* and *Bakke*, the Justices were deeply divided about whether to hear the dispute and issue a definitive statement about the programs' constitutionality. SCHWARTZ, *supra* note 13, at 32-34, 41-42.

¹⁸ *Bakke*, 438 U.S. 265.

intentional discrimination, and the desegregation orders were a way to remedy the effects of these past injustices. In *Bakke*, however, no one alleged that the Davis medical school had intentionally barred nonwhites from the class.¹⁹ Four members of the Court found that race-based affirmative action was impermissible except as a remedy for an institution's own past discriminatory practices, so Davis officials should have refrained from considering race in any way.²⁰ Another four Justices looked to congressional and executive actions that authorized consideration of race even in the absence of prior misconduct. In their view, affirmative action was an acceptable way of addressing racial disparities in access to higher education, so the Davis program was permissible.²¹

It fell to Justice Lewis Powell to break this deadlock. He charted a different course, concluding that race-based admissions practices were permissible to advance diversity in higher education.²² In developing a strict scrutiny rationale that relied on prospective benefits rather than past wrongs, Powell rejected several of the medical school's justifications for its program. Under strict scrutiny, Davis had to show that its race-conscious admissions practices were necessary to promote a compelling state interest. Powell found that affirmative action was not a constitutionally permissible means of rectifying general societal discrimination, of increasing the number of underrepresented minorities in the medical profession, or of providing doctors to meet the needs of underserved minority communities.²³ Instead, Powell upheld the use of race-conscious admissions by invoking the medical school's academic freedom to structure the pedagogical process as it saw fit. In his view, colleges and universities could place a value on diversity to foster an atmosphere of "speculation, experiment, and creation."²⁴ Diversity was a compelling interest that could satisfy the rigors of strict scrutiny.

In making this claim, Powell cited *Sweatt v. Painter*,²⁵ a case that dealt with the intentional exclusion of blacks from the University of Texas Law School. There the Court emphasized not just individual claims of discrimination but also

¹⁹ SCHWARTZ, *supra* note 13, at 27–32.

²⁰ *Bakke*, 438 U.S. at 408 (Stevens, Stewart, and Rehnquist, JJ. and Burger, C.J., concurring in part and dissenting in part) (applying strict scrutiny under Title VI).

²¹ *Id.* at 324 (Brennan, White, Marshall, and Blackmun, JJ., concurring in part and dissenting in part) (applying intermediate scrutiny under Title VI and the Equal Protection Clause).

²² *Id.* at 315–20 (Powell, J., announcing the judgment of the Court).

²³ *Id.* at 305–11.

²⁴ *Id.* at 312 (Frankfurter, J., concurring) (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 236 (1957)).

²⁵ *Sweatt v. Painter*, 339 U.S. 629 (1950).

the overall makeup of the law school class and the nature of the learning process:

The law school, the proving ground for legal learning and practice, cannot be effective in isolation from the individuals and institutions with which the law interacts. Few students and no one who has practiced law would choose to study in an academic vacuum, removed from the interplay of ideas and the exchange of views with which the law is concerned.²⁶

In short, a good legal education, and presumably any form of advanced study, must depend on the vigorous exchange of ideas among students. According to Powell, this dialogue could be impoverished if some backgrounds and perspectives were not adequately represented in the class.²⁷

Powell was careful to define diversity broadly to include not just race but other factors.²⁸ Using Harvard's undergraduate admissions program as a model, he made clear that race had to be part of a process of individualized review. For each candidate, race could be a plus along with other characteristics, such as "exceptional personal talents, unique work or service experience, leadership potential, maturity, demonstrated compassion, a history of overcoming disadvantage, [and] ability to communicate with the poor."²⁹ However, the weight accorded to race could not be so decisive that it effectively insulated nonwhite applicants from competing with others.³⁰ Quotas were impermissible because they dispensed with case-by-case review and created segregated processes that set aside a certain number of spaces each year for members of particular racial groups.³¹ In short, the Davis medical school could consider race, but it could not rely on a dual system of admissions for whites and nonwhites. Under strict scrutiny, segregated admissions processes were not necessary to achieve the school's compelling interest in diversity.

B. *The Aftermath of Bakke*

The Court's divided decision in *Bakke* did not resolve doubts about affirmative action in higher education. Beginning in the 1980s, strong opposition to the programs emerged, and by the 1990s, affirmative action faced

²⁶ *Id.* at 634.

²⁷ *Bakke*, 438 U.S. at 313-14.

²⁸ *Id.* at 314-15.

²⁹ *Id.* at 317.

³⁰ *Id.* at 317-18.

³¹ *Id.* at 319-20.

an increasingly hostile political climate.³² The Court's decisions during this period fueled the opposition. The Justices expressed growing reservations about the official use of racial preferences in employment and government contracting.³³ In striking down affirmative action programs, the Court emphasized that strict scrutiny applied to racial classifications, regardless of whether the government offered a purportedly benign purpose. In all circumstances, the use of race had to be necessary to promote a compelling state interest.³⁴

Bakke had treated diversity as a compelling interest, but the Court called this holding into question with its judicial flip-flopping in two government contracting cases. In *Metro Broadcasting v. Federal Communications Commission*,³⁵ a narrowly divided 1990 decision endorsed diversity as a justification for the use of affirmative action in awarding broadcasting licenses. In evaluating the licensing program, the Court applied an intermediate standard of review, rather than strict scrutiny, because it accorded special deference to federal decision makers.³⁶ Only five years later, in *Adarand Constructors, Inc. v. Peña*, the Court overruled the decision because federal affirmative action programs, like state ones, were subject to strict scrutiny.³⁷ The Court's reversal of *Metro Broadcasting* created some doubt about diversity's status as a compelling interest, even though this issue was not reached.³⁸

Bakke remained good law, but the longstanding disaffection with affirmative action programs began to take its toll.³⁹ Concerns about the future of diversity in higher education only grew when the Office for Civil Rights (OCR) launched a series of inquiries into admissions practices at selective public

³² Rachel F. Moran, *Diversity and Its Discontents: The End of Affirmative Action at Boalt Hall*, 88 CAL. L. REV. 2241, 2253 (2000).

³³ See, e.g., *Adarand Constrs., Inc. v. Peña*, 515 U.S. 200 (1995); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (plurality opinion).

³⁴ *Adarand*, 515 U.S. at 227; see also Diver, *supra* note 7, at 698–99 (discussing the Court's use of a test of ends and means and the legal conflicts that arise over how to define the end that arguably justifies the means).

³⁵ *Metro Broad. v. Fed. Comm'n Comm'n*, 497 U.S. 547 (1990).

³⁶ *Id.* at 566–69.

³⁷ *Adarand*, 515 U.S. at 227.

³⁸ Suzanne E. Eckes, *Race-Conscious Admissions Programs: Where Do Universities Go from Gratz and Grutter?*, 33 J.L. & EDUC. 21, 43 (2004); Linda S. Greene, *The Constitution and Racial Equality After Gratz and Grutter*, 43 WASHBURN L.J. 253, 259–60 (2004); Kenneth L. Karst, *The Revival of Forward-Looking Affirmative Action*, 104 COLUM. L. REV. 60, 62 n.9, 64 n.24 (2004).

³⁹ Eric Grodsky & Demetra Kalogrides, *The Declining Significance of Race: Race-Based Affirmative Action in College Admissions Between 1986 and 2003* at 22, 24 (June 6, 2005) (unpublished manuscript) (draft on file with author).

colleges and universities in the early 1990s. The University of California was especially hard-hit, facing investigations of undergraduate admissions at several campuses as well as admissions to some of its highly regarded graduate and professional programs.⁴⁰ The inquiry at the University of California School of Law (Boalt Hall) proved especially relevant to the Michigan cases. OCR challenged Boalt's segregation of applicants' files by race and its use of separate waiting lists. Both of these practices were quickly modified.⁴¹ However, OCR also demanded that the law school justify its decision to use racial and ethnic targets in admissions and explain how they were set.⁴²

In response, Boalt created an Admissions Policy Task Force, which drew on Powell's diversity rationale to address OCR's concerns. The Task Force strongly endorsed the pedagogical benefits of diversity and warned about the dangers of token representation.

Tokenism is the enemy of diversity. For groups previously excluded from access to legal education, feelings of alienation and isolation not only retard academic achievement but also silence the very voices that are the building blocks of a diverse law school. A critical mass of these students is necessary to achieve a truly diverse student body that contributes to the robust exchange of ideas.⁴³

The Task Force report documented Boalt's historical commitment to diversity and its recognition in 1976 that "with minority students there is also a critical mass problem; unless there is more than token representation, the school does not get the full measure of the benefit from the distinctive perspective of

⁴⁰ *Congressmen to Investigate Boalt Hall Admissions Dispute*, L.A. TIMES, Oct. 28, 1992, at B8 (describing OCR inquiries into admissions policies at UCLA, UC San Diego, UC Davis, and UC Berkeley's law school and optometry school); Larry Gordon, *U.S. to Investigate White, Asian Bias Charge at Berkeley*, L.A. TIMES, Jan. 18, 1990, at A32 (describing OCR inquiries into undergraduate admissions policies at Berkeley); David Smollar, *Congressman Accuses UCSD of Bias; Quotas: Rep. Dana Rohrabacher Seeks an Inquiry into Allegations that the School's Admissions Procedures Discriminate Against Ethnic Groups Such as Filipinos; A UCSD Official Denies the Charges*, L.A. TIMES, Oct. 10, 1991, at B1 (describing call for inquiries into undergraduate admissions policies at UCSD); Elaine Woo, *U.S. Probing Possible Asian Bias at UCLA, UC Berkeley*, L.A. TIMES, Nov. 18, 1988, pt. 1, at 3 (describing U.S. Department of Education investigation into undergraduate admissions policies at Berkeley and UCLA).

⁴¹ Karen DeWitt, *Berkeley Law School to Change Admission Policy*, N.Y. TIMES, Sept. 29, 1992, at A14; Jean Merl & William Trombley, *UC Law School Violates Rights, Inquiry Finds*, L.A. TIMES, Sept. 29, 1992, at A1.

⁴² Moran, *supra* note 32, at 2253-54.

⁴³ Rachel F. Moran et al., *Statement of Faculty Policy Governing Admission to Boalt Hall and Report of the Admissions Policy Task Force 24* (1993) (on file with author).

racial or cultural groups.”⁴⁴ Relying on available pedagogical research, the report elaborated on the concept of critical mass and linked it to the targets for admission that Boalt set.⁴⁵ OCR ultimately closed the investigation, satisfied that Boalt had discharged the burden of justifying its admissions policies and practices.⁴⁶

After a brief reprieve, Boalt’s affirmative action program was undone not by OCR nor even by litigation, but by the Board of Regents and a popular initiative. In 1995, the Board of Regents passed SP-1, which banned any consideration of race, ethnicity, or gender in the University of California’s admissions process. In lieu of these factors, SP-1 allowed weight to be given to race-neutral indicia of adversity, such as overcoming socioeconomic disadvantage or a dysfunctional family life.⁴⁷ One year later, the voters of California adopted Proposition 209, which banned preferences based on race, ethnicity, or gender in any aspect of state decision making.⁴⁸ Although civil rights lawyers challenged the measure, the Ninth Circuit upheld it as a legitimate exercise of state power.⁴⁹ Following California’s lead, Washington voters passed a similar initiative, and Governor Jeb Bush of Florida used an executive order to ban the consideration of race and ethnicity in college and university admissions.⁵⁰ In theory, these provisions did nothing more than allow states to opt out of using racial preferences. In fact, by questioning the fairness of race-based decision making, Proposition 209 and its progeny cast doubt on the moral and legal foundations of all affirmative action programs.

During the same year that Proposition 209 was passed, the Fifth Circuit Court of Appeals struck down an affirmative action program at the University of

⁴⁴ *Id.* at 25 (citing Appendix B to Report on Special Admissions at Boalt Hall after *Bakke* (Oct. 5, 1976)).

⁴⁵ *Id.* at 25–31.

⁴⁶ Moran, *supra* note 32, at 2254.

⁴⁷ THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, POLICY ENSURING EQUAL TREATMENT: ADMISSIONS (SP-1) (July 20, 1995), *available at* <http://www.berkeley.edu/news/berkeleyan/1995/0830/text.html>. The Regents simultaneously adopted SP-2, which bans preferences based on race, ethnicity, or gender in the University’s employment and contracting processes. THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, POLICY ENSURING EQUAL TREATMENT: EMPLOYMENT AND CONTRACTING (SP-2) (July 20, 1995), *available at* <http://www.berkeley.edu/news/berkeleyan/1995/0830/text.html>.

⁴⁸ Proposition 209 (Nov. 5, 1996) (codified at CAL. CONST. art. I, § 31) (permitting affirmative action in California government programs and activities only to the extent required by federal law).

⁴⁹ *Coal. for Econ. Equity v. Wilson*, 946 F. Supp. 1480 (N.D. Cal. 1996), *rev’d*, 122 F.3d 692, 701–10 (9th Cir. 1997), *cert. denied*, 522 U.S. 963 (1997).

⁵⁰ Peter Schmidt, *Behind the Fight Over Race-Conscious Admissions*, CHRON. OF HIGHER EDUC., Apr. 4, 2003, at 22.

Texas Law School as unconstitutional.⁵¹ In that case, Cheryl Hopwood, a white applicant who had been denied admission, alleged that she was a victim of reverse discrimination. Represented by the Center for Individual Rights (CIR), she argued that black and Latino applicants were admitted with substantially lower grades and test scores than white and Asian applicants. According to Hopwood, this pattern was so pronounced and pervasive that the law school must have employed impermissible racial quotas, rather than a plus for race.⁵²

Neither the OCR inquiries nor the popular initiatives directly questioned whether *Bakke* remained good law. OCR simply demanded strict compliance with the decision, and the initiatives demonstrated that affirmative action programs were voluntary rather than compulsory. In *Hopwood*, however, the Fifth Circuit took aim at the heart of Powell's opinion. According to the Court of Appeals, racial preferences in admissions could be used only to remedy past discrimination. Diversity was not a compelling interest that justified race-based treatment in admissions, and Powell's view had never won majority support.⁵³ The Fifth Circuit's decision was notable because the lawsuit could have been resolved by focusing on procedural problems in the law school's admissions process, particularly the segregated review of applicant files.⁵⁴ In fact, the district court had invalidated Texas's policy because it was not narrowly tailored, although the judge made clear that diversity could serve as the basis for a constitutionally acceptable program.⁵⁵

Even though *Hopwood* directly attacked the premises of the *Bakke* decision, the United States Supreme Court declined to grant certiorari.⁵⁶ Because Texas had already rectified the procedural defects in its program, the Court was concerned that the system at issue in *Hopwood* was no longer in use.⁵⁷ Moreover, Texas's practices were something of an embarrassment for *Bakke*, suggesting that even law schools had failed to implement truly competitive systems of individualized review. Under the circumstances, Justices sympathetic to affirmative action were well-advised to bide their time until a lawsuit challenged an admissions process that adhered closely to *Bakke*'s requirements. Meanwhile, *Hopwood* suspended the use of affirmative action programs in Texas, Mississippi, and Louisiana.⁵⁸ As a result, race-neutrality had become the

⁵¹ *Hopwood v. Texas*, 861 F. Supp. 551 (W.D. Tex. 1994), *rev'd and remanded in part*, 78 F.3d 932 (5th Cir. 1996), *cert. denied*, 518 U.S. 1033 (1996).

⁵² *Hopwood*, 861 F. Supp. at 574.

⁵³ *Hopwood*, 78 F.3d at 944–55.

⁵⁴ *Hopwood*, 861 F. Supp. at 560–62.

⁵⁵ *Id.* at 579–84.

⁵⁶ *Hopwood*, 518 U.S. 1033 (1996).

⁵⁷ *Id.* at 1033–34 (Ginsburg, J., concurring).

⁵⁸ GREG STOHR, A BLACK AND WHITE CASE: HOW AFFIRMATIVE ACTION SURVIVED ITS

norm, by popular initiative or judicial fiat, in a substantial minority of states, some of which were among the most racially and ethnically diverse in the nation.

Hopwood received widespread attention because it took direct aim at *Bakke*, but two other federal courts of appeal took a less confrontational approach in addressing the constitutionality of affirmative action programs. In *Smith v. University of Washington Law School*,⁵⁹ the Ninth Circuit concluded that diversity could be a compelling interest that justified a law school's affirmative action program. The Court of Appeals recognized the unique nature of higher education and concluded that *Bakke* remained good law.⁶⁰ In particular, the *Smith* decision rejected the argument that Powell had spoken only for himself when he endorsed diversity. According to the Ninth Circuit, because four Justices were willing to adopt a broad remedial rationale for affirmative action, they concurred in the narrower justification that Powell offered.⁶¹ Though notable for its rejection of *Hopwood*, the Ninth Circuit's decision ultimately had little impact on the law school's admissions practices because Washington State had already banned racial preferences by popular initiative.⁶² In *Johnson v. Board of Regents of the University of Georgia*,⁶³ the Eleventh Circuit hinted that diversity might not be a compelling interest but chose to invalidate an undergraduate affirmative action program at the University of Georgia on the ground that it was not narrowly tailored. In particular, the court found that the mechanistic award of points for race was not necessary to advance the school's interest in diversity.⁶⁴ Despite the growing confusion in the lower courts, the United States Supreme Court did not review either *Smith* or *Johnson*.⁶⁵

In short, by 2001 the legitimacy of affirmative action remained hotly contested in the courts and at the ballot box. In higher education, the Fifth Circuit's decision in *Hopwood* relegated Powell's opinion in *Bakke* to the jurisprudential junk heap. In *Hopwood*, the Court of Appeals insisted that Powell had written only for himself and that intervening decisions now made clear that corrective justice was the only permissible justification for affirmative

GREATEST LEGAL CHALLENGE 30 (2004).

⁵⁹ *Smith v. Univ. of Wash. Law Sch.*, 233 F.3d 1188 (9th Cir. 2000).

⁶⁰ *Id.* at 1188, 1198–1201.

⁶¹ *Id.* at 1199.

⁶² Adalberto Aguirre, Jr. & Rubén Martinez, *The Diversity Rationale in Higher Education: An Overview of the Contemporary Legal Context*, 30 SOC. JUST. 138 (2003).

⁶³ *Johnson v. Bd. of Regents of the Univ. of Ga.*, 263 F.3d 1234 (11th Cir. 2001).

⁶⁴ *Id.* at 1254–62.

⁶⁵ The Court denied certiorari in the Washington case. *Smith v. Univ. of Wash. Law Sch.*, 532 U.S. 1051 (2001). The University of Georgia chose not to seek Supreme Court review of the *Johnson* decision. Sara Hebel, *U. of Georgia Won't Appeal Affirmative Action Case to Supreme Court*, CHRON. OF HIGHER EDUC., Nov. 23, 2001, at 23.

action. As a result, racial preferences in admissions were unconstitutional except when used to remedy past discrimination. Other federal courts upheld the diversity rationale, but the question of narrow tailoring remained a serious concern. Finally, some states had extricated themselves from these judicial uncertainties altogether by banning racial preferences through the political process.

II. THE MICHIGAN CASES: *GRUTTER* AND *GRATZ*

Founded a decade after the *Bakke* decision, the Center for Individual Rights (CIR) had waged a steady campaign against affirmative action programs, and in higher education, *Hopwood* marked its greatest success.⁶⁶ Even so, CIR was not satisfied. Despite *Hopwood*'s high profile, "the vast majority of institutions kept their affirmative action programs intact, save for some tinkering around the edges."⁶⁷ As a result, CIR was eager for a decisive victory that would put an end to race-based preferences in admissions. Critics had been vigorously challenging Michigan's undergraduate admissions policy. Increasingly, CIR believed that the highly selective, public campus in Ann Arbor offered an ideal opportunity to revisit the constitutionality of affirmative action in higher education.⁶⁸ Well aware of the possibility of litigation, Michigan officials had been carefully reviewing and retooling their admissions processes to conform as closely as possible to *Bakke*'s requirements. The university began to assemble its legal team and prepare a public relations campaign.⁶⁹ The battle lines were steadily being drawn in a momentous civil rights struggle.

A. *The Facts*

Like many epic legal battles, this one had to start with the stories of individuals who felt wronged and wanted redress. CIR focused on both undergraduate and law school admissions. Jennifer Gratz and Patrick Hamacher became the lead plaintiffs on behalf of a class of white and Asian American students who alleged that the college admissions program had denied them a fair opportunity to compete. CIR chose Gratz and Hamacher after a careful evaluation of their academic records. With a 3.5 grade point average, Gratz had ranked in the top five percent of her graduating high school class. She also had scored in the eighty-third percentile on the ACT college admissions test and had

⁶⁶ STOHR, *supra* note 58, at 27 (noting the date of CIR's founding); *id.* at 30 (noting that *Hopwood* was CIR's greatest success).

⁶⁷ *Id.* at 31.

⁶⁸ *Id.* at 33-37.

⁶⁹ *Id.* at 33-35, 39-43.

participated in a wide array of extracurricular activities. From a modest working-class background, Gratz was an appealing plaintiff with a story of hard work, ambition, and accomplishment.⁷⁰ Hamacher was a similarly attractive plaintiff: he had a 3.4 grade point average, had scored in the eighty-ninth percentile on the ACT, was a varsity athlete, and worked part-time. Both Gratz and Hamacher had been wait-listed at Michigan.⁷¹ For the law school case, CIR found another compelling plaintiff, Barbara Grutter, to challenge affirmative action in admissions. Grutter had a 3.8 grade point average from Michigan State, and her LSAT score placed her in the eighty-sixth percentile. She was forty-three years old, had two children, and had run a health-care consulting firm from her home. She hoped to study health-care law and was wait-listed at the University of Michigan Law School.⁷²

Although the plaintiffs in each case alleged that they had been victims of reverse discrimination, the undergraduate and law school admissions programs actually operated differently in promoting the goal of diversity. From 1995 to 1996, the undergraduate program relied on a grid that established guidelines for admission based on an adjusted high school grade point average and standardized test scores. The guidelines varied depending on an applicant's race or ethnicity. Originally, the grade point average was adjusted based on the quality of the applicant's high school, the strength of the curriculum taken, unusual circumstances, geographical residence, and alumni relationships.⁷³ In 1997, the factors were expanded to include underrepresented minority status, socioeconomic disadvantage, attendance at a minority high school, or application to a program in which the student's group was underrepresented.⁷⁴ From 1995 to 1998, the undergraduate admissions office also held back some "protected seats" for applicants who applied later in the process and were from groups such as "athletes, foreign students, ROTC candidates, and underrepresented minorities."⁷⁵ If these "protected seats" were not used, then other qualified students, including those on the wait-list, could be admitted to fill them.⁷⁶

The undergraduate grid had generated considerable controversy by the time Lee Bollinger was selected as President of the University of Michigan. He immediately set about revamping the system, in part because he feared that it

⁷⁰ *Id.* at 1–2, 45–47.

⁷¹ *Id.* at 49.

⁷² STOHR, *supra* note 58, at 47–48.

⁷³ Gratz v. Bollinger, 539 U.S. 244, 254 (2003).

⁷⁴ *Id.* at 255.

⁷⁵ *Id.* at 256.

⁷⁶ *Id.*

was “too mechanistic” and would become the target of litigation.⁷⁷ Beginning in 1998, the undergraduate admissions program created a selection index that awarded up to 150 points to each applicant. To permit individualized review, students received points for their “high school grade point average, standardized test scores, academic quality of an applicant’s high school, strength or weakness of high school curriculum, in-state residency, alumni relationship, personal essay, and personal achievement or leadership.”⁷⁸ In a miscellaneous category, applicants could be awarded twenty points for “membership in an underrepresented racial or ethnic minority group.”⁷⁹ In addition to the point system, the University established a separate process in which some students might receive discretionary review if they were academically prepared and had a minimum selection index score.⁸⁰ To promote diversity, this process was used for students with “high class rank, unique life experiences, challenges, circumstances, interests or talents, socioeconomic disadvantage, and underrepresented race, ethnicity, or geography.”⁸¹

Before assuming the presidency, Bollinger had been Dean of the University of Michigan Law School. There, he had also taken steps to ensure that the admissions process complied with *Bakke*.⁸² In contrast to the mechanistic undergraduate system, the law school relied heavily on holistic, individualized review. Under this approach, “admissions officials [were required] to evaluate each applicant based on all the information available in the file, including a personal statement, letters of recommendation, and an essay describing the ways in which the applicant will contribute to the life and diversity of the Law School.”⁸³ In reviewing the files, admissions officials looked at undergraduate grades and LSAT scores, but “even the highest possible score [did] not guarantee admission to the Law School” and “a low score [did not] automatically disqualify an applicant.”⁸⁴ The reviewers had to “look beyond grades and test scores”⁸⁵ to consider a range of “soft” variables related to the law school’s educational mission and its commitment to diversity.⁸⁶ These included “the enthusiasm of recommenders, the quality of the undergraduate

⁷⁷ STOHR, *supra* note 58, at 34.

⁷⁸ *Gratz*, 539 U.S. at 255.

⁷⁹ *Id.*

⁸⁰ *Id.* at 256–57.

⁸¹ *Id.*

⁸² STOHR, *supra* note 58, at 14–15.

⁸³ *Grutter v. Bollinger*, 539 U.S. 306, 315 (2003).

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

institution, the quality of the applicant's essay, and the areas and difficulty of undergraduate course selection"⁸⁷ as well as a range of other characteristics, including race and ethnicity, which would promote diversity.⁸⁸ Relatively few such characteristics received substantial weight in admissions, but there was a special commitment to achieving a "critical mass" of students from underrepresented groups to "ensur[e] their ability to make unique contributions to the character of the Law School."⁸⁹

B. *The Legal Arguments*

The Court's decisions in the Michigan cases were closely watched and highly anticipated. Indeed, the interest was so intense that large numbers of individuals and organizations became involved in the case either as intervenors or amici curiae. Although it was clear that CIR and Michigan both intended to litigate vigorously, the intervenors asserted that they had interests that would go unrepresented in each case. In the undergraduate lawsuit, Ted Shaw of the National Association for the Advancement of Colored People's Legal Defense and Educational Fund (LDF) worked with three Detroit lawyers to intervene on behalf of seventeen high school students in Michigan as well as a nonprofit organization consisting of prospective students and their families. The named students were all black with the exception of one Latino.⁹⁰ In the law school case, Miranda Massie, a young lawyer at a three-person Detroit firm, moved to intervene on behalf of forty-one individual plaintiffs as well as three nonprofit organizations that included students, teachers, and parents among their members. In contrast to Shaw's clients, Massie served a racially and ethnically diverse group of whites, blacks, Latinos, Asian Americans, and mixed-race individuals.⁹¹

Both Shaw and Massie claimed that students were most directly affected by the litigation because their access to and experience in higher education could be dramatically affected by the results. However, Shaw limited himself to addressing concerns about historical discrimination at the University of Michigan, while Massie was willing to attack institutional racism, standardized testing, and gender equity. In pursuing this broad strategy, Massie hoped to use

⁸⁷ *Id.*

⁸⁸ *Id.* at 316.

⁸⁹ *Grutter v. Bollinger*, 539 U.S. 306, 316 (2003).

⁹⁰ Motion to Intervene, *Gratz v. Bollinger*, Civ. Action No. 97-75231 (Feb. 5, 1998) [hereinafter *Gratz* District Court Motion to Intervene]; STOHR, *supra* note 58, at 84–85.

⁹¹ Motion to Intervene, *Grutter v. Bollinger*, Civ. Action No. 97-75928 (Mar. 26, 1998) [hereinafter *Grutter* District Court Motion to Intervene]; see STOHR, *supra* note 58, at 88.

the litigation to mobilize a new civil rights movement.⁹² Initially, the district court judges in both *Grutter* and *Gratz* denied the motions to intervene.⁹³ However, the Sixth Circuit Court of Appeals eventually reversed these decisions and allowed the intervenors to participate.⁹⁴ Ultimately, their efforts to redefine the scope of the litigation—whether modestly or broadly—did not succeed. Issues of historical discrimination and institutional racism played little role in the final resolution of the lawsuits. In fact, both Shaw and Massie were denied time to participate in oral arguments before the Supreme Court.⁹⁵ For that reason, the analysis here will focus on the diversity rationale that lay at the heart of the battle between CIR and the Michigan defendants.

Although the intervenors' attempts to reframe the legal arguments failed, the Court could hardly forget the high political stakes surrounding affirmative action, given the large number of amicus briefs filed in the Michigan cases. In the battle of the briefs, the university and the law school came out the clear victors. Hundreds of amici curiae, representing the academy, the civil rights community, the business world, and the military, filed briefs in support of Michigan's claims,⁹⁶ while fewer than twenty briefs aligned themselves with CIR's position.⁹⁷ Even the Bush Administration's brief failed to take a clear stand on whether diversity was a compelling interest and whether race-neutral alternatives were mandatory in all circumstances.⁹⁸ Instead, the amicus brief for the United States declared that "[e]nsuring that public institutions are open and available to all segments of American society, including people of all races and ethnicities, represents a paramount government objective."⁹⁹ Despite this laudable objective, the United States charged that Michigan was using quota systems and that ample race-neutral alternatives were available based on

⁹² See generally STOHR, *supra* note 58, at 84–89, 90–91. Compare *Gratz* District Court Motion to Intervene, *supra* note 90 with *Grutter* District Court Motion to Intervene, *supra* note 91.

⁹³ Opinion and Order Denying Motion to Intervene, *Grutter v. Bollinger*, Civ. Action No. 97-CV-75928DT (July 6, 1998); *Gratz v. Bollinger*, 183 F.R.D. 209 (E.D. Mich. 1998).

⁹⁴ *Grutter v. Bollinger*, 188 F.3d 394 (6th Cir. 1999).

⁹⁵ *Grutter v. Bollinger*, 538 U.S. 904 (mem.) (2003) (No. 02-241); *Gratz v. Bollinger*, 538 U.S. 904 (mem.) (2003) (No. 02-516); STOHR, *supra* note 58, at 256–57. Moreover, one commentator labeled the intervenors' role in the Sixth Circuit arguments "a sideshow." *Id.*

⁹⁶ Greene, *supra* note 38, at 256–58; STOHR, *supra* note 58, at 247–51, 253–54. For a description of how Michigan enlisted the support of numerous allies as amici in the case, see Denise O'Neil Green, *Justice and Diversity: Michigan's Response to Gratz, Grutter, and the Affirmative Action Debate*, 39 URB. EDUC. 374, 386–89 (2004).

⁹⁷ See STOHR, *supra* note 58, at 254–56; Eckes, *supra* note 38, at 44 n.176.

⁹⁸ See generally STOHR, *supra* note 58, at 235–44; Eckes, *supra* note 38, at 44.

⁹⁹ Brief for the United States as Amicus Curiae Supporting Petitioner at 13, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241).

experiences in California, Texas, and Florida.¹⁰⁰

As a result of the intense interest generated by the cases, CIR and Michigan made their legal arguments in the shadow of the politics of affirmative action. That said, the parties focused closely on the reasoning in *Bakke*, subsequent equal protection cases, and the appropriate constitutional standards to apply. In particular, the arguments were devoted to determining whether Michigan's use of race-based admissions policies satisfied strict scrutiny. Under this standard, university and law school administrators had to show that their policies were necessary to serve a compelling state interest.¹⁰¹ CIR insisted that diversity was not a compelling interest and that, in any event, the admissions programs were not narrowly tailored to serve this objective.¹⁰² Michigan defended each program as an appropriate application of the principles laid down in *Bakke*.¹⁰³ Ultimately, the Justices offered some comfort to each side. *Grutter* declared that diversity could be a compelling purpose, but *Gratz* made clear that the requirement of narrow tailoring would be an exacting one.

1. Diversity as a Compelling Interest

In both *Grutter* and *Gratz*, CIR tried to build on its success in *Hopwood* by arguing that diversity is not a compelling interest. In the lower courts, this strategy met with mixed results. In the *Grutter* case, the federal district court judge found that diversity was not compelling, while in *Gratz*, the judge took the opposite view.¹⁰⁴ The Sixth Circuit then held that diversity was a constitutionally permissible justification for affirmative action programs.¹⁰⁵ When the United States Supreme Court granted certiorari,¹⁰⁶ CIR once again argued that *Bakke* was not binding precedent because Justice Powell spoke only

¹⁰⁰ *Id.* at 14–25; Brief for the United States as Amicus Curiae Supporting Petitioners at 13–17, *Gratz v. Bollinger*, 539 U.S. 244 (2003) (No. 02–516).

¹⁰¹ See *Adarand Constrs., Inc. v. Peña*, 515 U.S. 200, 227 (1995) (defining the standard of strict scrutiny in an equal protection case involving government contracting).

¹⁰² Brief for Petitioner at 19–20, *Grutter v. Bollinger*, 539 U.S. 306 (No. 02–241) [hereinafter *Grutter* Brief for Petitioner]; Brief for Petitioners at 31–33, *Gratz v. Bollinger*, 539 U.S. 244 (No. 02–516) [hereinafter *Gratz* Brief for Petitioners].

¹⁰³ Brief for Respondents at 12–14, *Grutter v. Bollinger*, 539 U.S. 306 (No. 02–241) [hereinafter *Grutter* Brief for Respondents]; Brief for Respondents at 13–21, *Gratz v. Bollinger*, 539 U.S. 244 (No. 02–516) [hereinafter *Gratz* Brief for Respondents].

¹⁰⁴ *Grutter v. Bollinger*, 137 F. Supp. 2d 821, 872 (E.D. Mich. 2001), *rev'd*, 288 F.3d 732 (6th Cir. 2002) (en banc), *aff'd*, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 122 F. Supp. 2d 811, 824 (E.D. Mich. 2000), *rev'd in part*, 539 U.S. 244 (2003).

¹⁰⁵ *Grutter*, 288 F.3d 732, 733, 746, 749 (6th Cir. 2002) (en banc).

¹⁰⁶ *Grutter*, 537 U.S. 1043; *Gratz*, 537 U.S. 1044.

for himself in adopting the diversity rationale.¹⁰⁷ In particular, Powell's was an isolated voice because his analysis did not hold up in light of subsequent court decisions: "Although Justice Powell derived his lone analysis for the compelling nature of diversity from First Amendment principles, the Court has never recognized academic freedom specifically, or First Amendment principles generally, as justifications for government-sponsored race discrimination."¹⁰⁸ According to CIR, the diversity rationale was so amorphous that it gave colleges and universities largely unchecked discretion to use racial preferences, which often seemed indistinguishable from impermissible quotas.¹⁰⁹ Finally, CIR asserted that even if diversity generated some educational benefits, they were not sufficient to justify a core violation of the Fourteenth Amendment's guarantee of equal protection from racial discrimination.¹¹⁰

The University of Michigan responded that Powell's diversity rationale enjoyed the support of a majority of the Justices in *Bakke* and that principles of stare decisis counseled strongly in favor of preserving the decision.¹¹¹ *Bakke* had produced workable rules that colleges and universities relied upon in developing their admissions programs.¹¹² According to Michigan, "overruling *Bakke* would cause 'significant damage to the stability of the society governed by it'" because it would "force this Nation's elite and selective institutions of higher education, public and private, to an immediate choice between dramatic resegregation and abandoning academic selectivity."¹¹³ Adopting a diversity rationale was an appropriate exercise of academic freedom because students "need to learn how to bridge racial divides, work sensitively and effectively with people of different races, and simply overcome the initial discomfort of interacting with people visibly different from themselves"¹¹⁴ Michigan reminded the Court that the United States had a date with demographic destiny

¹⁰⁷ *Grutter* Brief for Petitioner, *supra* note 102, at 21–29; *Gratz* Brief for Petitioners, *supra* note 102, at 31–33.

¹⁰⁸ *Grutter* Brief for Petitioner, *supra* note 102, at 29; *see also* *Gratz* Brief for Petitioners, *supra* note 102.

¹⁰⁹ *Grutter* Brief for Petitioner, *supra* note 102, at 31–33; *Gratz* Brief for Petitioners, *supra* note 102, at 39–48.

¹¹⁰ *Grutter* Brief for Petitioner, *supra* note 102, at 33–35; *Gratz* Brief for Petitioners, *supra* note 102, at 33–37.

¹¹¹ *Grutter* Brief for Respondents, *supra* note 103, at 15–21; *Gratz* Brief for Respondents, *supra* note 103, at 13–21.

¹¹² *Grutter* Brief for Respondents, *supra* note 103, at 18–19; *Gratz* Brief for Respondents, *supra* note 103, at 17–19.

¹¹³ *Grutter* Brief for Respondents, *supra* note 103, at 19–20; *see also* *Gratz* Brief for Respondents, *supra* note 103, at 18–19.

¹¹⁴ *Grutter* Brief for Respondents, *supra* note 103, at 25; *see also* *Gratz* Brief for Respondents, *supra* note 103, at 24–25, 28–29.

as “a society in which, within the careers of its current students, white citizens will become a minority of the population.”¹¹⁵ Public institutions of higher education could not disregard this impending reality in preparing their students for work and civic obligations.

Applying strict scrutiny, the Court split over whether diversity is a compelling interest. Writing for the majority, Justice Sandra Day O'Connor observed that the “educational judgment that . . . diversity is essential to [the] educational mission is one to which we defer.”¹¹⁶ Noting that the academic freedom of colleges and universities had “occup[ied] a special niche in our constitutional tradition,”¹¹⁷ she concluded that Michigan had amply substantiated the educational benefits of diversity. Not only did diversity enhance the learning process, but it also permitted public institutions of higher education to “cultivate a set of leaders with legitimacy in the eyes of the citizenry” by demonstrating that “the path to leadership [is] visibly open to talented and qualified individuals of every race and ethnicity.”¹¹⁸

Joined by Justice Antonin Scalia, Justice Clarence Thomas dissented vigorously from the majority's endorsement of diversity as a compelling interest. Thomas insisted that states did not have a compelling interest in providing legal education at a public university, much less an elite legal education that required racial preferences to achieve diversity.¹¹⁹ Michigan's law school served large numbers of out-of-state residents, and many graduates left the state to practice elsewhere.¹²⁰ As a result, the affirmative action program did little to develop leadership for the citizens of Michigan.¹²¹ In any event, Michigan was free to diversify its entering class by lowering the scholastic barriers to admission.¹²² Thomas concluded that “[t]he majority's broad deference to both the Law School's judgment that racial aesthetics leads to educational benefits and its stubborn refusal to alter the status quo in admissions methods finds no basis in the Constitution or decisions of this Court.”¹²³

¹¹⁵ *Grutter* Brief for Respondents, *supra* note 103, at 25.

¹¹⁶ *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003).

¹¹⁷ *Id.* at 329.

¹¹⁸ *Id.* at 332.

¹¹⁹ *Id.* at 349, 357–60 (Thomas, J., dissenting).

¹²⁰ *Id.* at 359.

¹²¹ *Id.* at 359–60.

¹²² *Grutter*, 539 U.S. at 361–62 (2003) (Thomas, J., dissenting).

¹²³ *Id.* at 364.

2. *Narrow Tailoring and Individualized Review*

Even if diversity qualified as a compelling interest, Michigan's programs had to be narrowly tailored to serve that objective. CIR argued that neither the undergraduate nor the law school policies satisfied this standard. In challenging undergraduate admissions, CIR described the point system as one of "rigid, mechanical racial preferences."¹²⁴ As a result, the program resulted in a "two-track" or "dual" system with "separate standards of admission for the 'underrepresented' minorities and all other groups."¹²⁵ According to CIR, the automatic award of twenty points for race and ethnicity was indistinguishable from the quotas and set-asides condemned in *Bakke* because Michigan statistically weighted the number of points in order to ensure a particular level of minority representation.¹²⁶ Nor did the inclusion of other factors save the system: "a point-based admissions system like the University's, which can effectively achieve the same results as a formal race quota, is no less effective as such merely because it awards points for other factors as well."¹²⁷ The point system was not the sort of flexible approach that *Bakke* mandated, nor did the University show that it had set up the system to achieve "critical mass" rather than racial balance.¹²⁸ Finally, the University failed to explore race-neutral alternatives, such as percentage plans.¹²⁹

In response, the University argued that its undergraduate admissions program applied a plus on the basis of race but did not insulate minority applicants from competition with other applicants.¹³⁰ The process involved individualized review of each candidate, and a wide array of factors, including race, were considered.¹³¹ High-achieving applicants were apt to be accepted regardless of race, while low-achieving ones would be rejected irrespective of race.¹³² The plus for race primarily made a difference to applicants in the middle, who were qualified for admission along with many others.¹³³ Michigan argued that it could accord the same number of points to all minority applicants because its purpose was to generate a diverse student body, not to remedy

¹²⁴ *Gratz* Brief for Petitioners, *supra* note 102, at 19.

¹²⁵ *Id.* at 24.

¹²⁶ *Id.* at 25.

¹²⁷ *Id.* at 26.

¹²⁸ *Id.* at 28–30.

¹²⁹ *Id.* at 30.

¹³⁰ *Gratz* Brief for Respondents, *supra* note 103, at 35.

¹³¹ *Id.* at 35–36.

¹³² *Id.* at 36.

¹³³ *Id.* at 36–37.

discrimination against the disadvantaged.¹³⁴ Citing *Bakke*'s deference to the good faith exercise of educational expertise, the University contended that the weight given to race reflected an informed judgment about how to achieve the benefits of diversity, given the small pool of minority applicants with competitive academic credentials.¹³⁵

Michigan indicated that preferences were essential because race-neutral alternatives would not work. Percentage plans were premised on racial segregation in public elementary and secondary schools, abandoned individualized review in favor of geographic quotas, and undermined a flagship public university's stature as a national rather than regional institution.¹³⁶ Moreover, percentage plans typically were not race-neutral, but instead were an effort to circumvent bans on affirmative action so that diversity could be preserved.¹³⁷ In any event, a percentage plan would not generate a racially diverse student body in Michigan because of the demographic distribution of high school students.¹³⁸

A majority of the Justices ultimately agreed with CIR that the undergraduate admissions program was unconstitutional. In an opinion by Chief Justice William Rehnquist, the Court found that the Michigan point system did not provide individualized review of each applicant.¹³⁹ As Rehnquist explained, under the University's approach, "[e]ven if student C's 'extraordinary artistic talent' rivaled that of Monet or Picasso, the applicant would receive, at most, five points"¹⁴⁰ Meanwhile, the program automatically gave twenty points to each minority candidate, a weight so substantial that it was decisive for any minimally qualified applicant.¹⁴¹ The University's selective review of particular files could not cure the deficiencies in the point system. This review was "the exception and not the rule" and was applied only after the automatic award of twenty points to minority applicants.¹⁴² Michigan could not defend the point system on the ground that the volume of applications made individualized review too expensive. Administrative convenience would not justify a constitutional violation.¹⁴³ Only Justices David Souter and Ruth Bader Ginsburg

¹³⁴ *Id.* at 38–39.

¹³⁵ *Id.* at 40–41.

¹³⁶ *Gratz* Brief for Respondents, *supra* note 103, at 44–45.

¹³⁷ *Id.*

¹³⁸ *Id.* at 41–49.

¹³⁹ *Gratz v. Bollinger*, 539 U.S. 244, 272 (2003).

¹⁴⁰ *Id.* at 273.

¹⁴¹ *Id.* at 272.

¹⁴² *Id.* at 273–74.

¹⁴³ *Id.* at 274.

took serious issue with these conclusions. Both believed that the point system more closely resembled permissible individualized consideration than it did an impermissible quota.¹⁴⁴ Souter insisted that “the candor of the admissions plan” in awarding points for race should not become its “Achilles’ heel.”¹⁴⁵

CIR also contended that the law school’s use of pluses for race and ethnicity to achieve critical mass was tantamount to a quota system. In particular, grids and statistics on minority and non-minority admissions showed that:

the Law School has implemented its written admissions policy of placing great importance on grades and test scores generally, while pursuing a “commitment to racial and ethnic diversity” that entails admitting students from the specified racial and ethnic minority groups whose grades and test scores . . . are “relatively far” from those of the “overwhelming bulk of students admitted.”¹⁴⁶

CIR took the law school to task for failing to set time limits on the use of racial preferences; for offering no convincing rationale for the choice of groups that receive preferences; for using critical mass to advance an agenda of racial balancing; and for not employing race-neutral alternatives such as evaluating students’ actual experiences rather than assuming a unique perspective based on race or ethnicity.¹⁴⁷

The law school countered that there were no race-neutral alternatives that could generate meaningful racial diversity. In particular, Michigan dismissed as inadequate strategies for outreach and recruitment, a drop in academic standards, percentage plans, or plans that weighed either socioeconomic disadvantage or experiential diversity.¹⁴⁸ The law school also argued that its pursuit of critical mass was not tantamount to a quota because pluses for race or ethnicity were applied flexibly during a process of individualized review. The law school aspired to include more than token numbers of underrepresented minority students in the entering class, but no rigid numerical requirements were imposed.¹⁴⁹ Finally, the plus accorded to race was modest and did not unduly burden other applicants. Academic criteria remained the most significant factor in the admissions process.¹⁵⁰

Here, a majority of the Court agreed with Michigan that the law school’s

¹⁴⁴ *Id.* at 291, 293–98 (Souter, J., dissenting); *id.* at 298, 302–05 (Ginsburg, J., dissenting).

¹⁴⁵ *Gratz*, 539 U.S. at 297 (Souter, J., dissenting).

¹⁴⁶ *Grutter* Brief for the Petitioner, *supra* note 102, at 40.

¹⁴⁷ *Id.* at 42–44.

¹⁴⁸ *Grutter* Brief for Respondents, *supra* note 103, at 33–38.

¹⁴⁹ *Id.* at 38–43.

¹⁵⁰ *Id.* at 43–49.

admissions system was constitutional. O'Connor's opinion pointed out that all of the applicants admitted were academically qualified, and a wide array of qualities and experiences had been evaluated in the process.¹⁵¹ The evidence indicated that, "the Law School engages in a highly individualized, holistic review of each applicant's file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment."¹⁵² Even more importantly, "the Law School actually gives substantial weight to diversity factors besides race."¹⁵³

The Court also concluded that the law school was not required to use a race-neutral alternative. As O'Connor explained:

Narrow tailoring does not require exhaustion of every conceivable race-neutral alternative. Nor does it require a university to choose between maintaining a reputation for excellence or fulfilling a commitment to provide educational opportunities to members of all racial groups. . . . Narrow tailoring does, however, require serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks.¹⁵⁴

The law school considered, and properly rejected, various alternatives as infeasible. These included a lottery for admission, lower admissions standards, and percentage plans, all of which were inconsistent with the institution's mission and precluded careful individualized review.¹⁵⁵ Still, the Justices were concerned about the seemingly permanent commitment to racial and ethnic preferences in admissions, and so the Court expressed an expectation "that 25 years from now, the use of racial preferences will no longer be necessary to further the interest [in diversity] approved today."¹⁵⁶

Chief Justice Rehnquist, who had authored the majority opinion striking down the undergraduate admissions process, provided one of the most telling dissents. He pointed out that the law school offered no explanation as to why it required a critical mass of African American students that was twice as large as for Hispanics and six times as large as for Native Americans.¹⁵⁷ Nor did Michigan account for its "substantially different treatment among the three underrepresented minority groups" with qualified Hispanics far more likely to be rejected than similarly credentialed African American and Native American

¹⁵¹ *Grutter v. Bollinger*, 539 U.S. 306, 337–38 (2003).

¹⁵² *Id.* at 337.

¹⁵³ *Id.* at 338.

¹⁵⁴ *Id.* at 339.

¹⁵⁵ *Id.* at 340.

¹⁵⁶ *Id.* at 343.

¹⁵⁷ *Grutter*, 539 U.S. at 378, 381 (2003) (Rehnquist, C.J., dissenting).

applicants.¹⁵⁸ As Rehnquist noted:

[law school officials] have *never* offered any race-specific arguments explaining why significantly more individuals from one underrepresented minority group are needed in order to achieve “critical mass” or further student body diversity. They certainly have not explained why Hispanics, who they have said are among “the groups most isolated by racial barriers in our country,” should have their admission capped out in this manner.¹⁵⁹

Rehnquist believed that the concept of critical mass could not account for the past patterns of admission decisions. Instead, the law school appeared to be matching the racial makeup of the entering class to that of the applicant pool.¹⁶⁰ Like the majority, Rehnquist worried about the lack of time limits on the program and found that the law school had provided only “the vaguest of assurances” that the use of racial preferences would eventually end.¹⁶¹ For Rehnquist, all of these defects proved fatal, even if diversity could be a compelling interest.

The Michigan litigation gave some comfort to each side in the affirmative action debate. Civil rights advocates won an important victory when a majority of the Court endorsed diversity as a compelling interest in the law school case. At the same time, the undergraduate decision provided a sobering reminder that the line between a permissible preference and an impermissible quota can be a thin one. The Michigan opinions reflected the Court’s ongoing ambivalence about the propriety of affirmative action in higher education. The Justices recognized the harms that will ensue if America’s most select colleges and universities revert to being racially identifiable. At the same time, these institutions are not themselves responsible for the racial achievement gap that they face in the admissions process. Nor will affirmative action at the most elite schools cure the social and economic stratification that dooms many underrepresented students to inferior educational opportunities. So, the Court had to chart a new course, one that looks to a multiracial future without wholly disregarding the implications of a segregated past. The result is ongoing uncertainty about how this delicate jurisprudential balancing act will evolve.

III. THE AFTERMATH OF THE MICHIGAN CASES

In dissent from *Grutter*, Justice Antonin Scalia described the Michigan

¹⁵⁸ *Id.* at 382.

¹⁵⁹ *Id.* at 382–83 (emphasis in original).

¹⁶⁰ *Id.* at 383–85.

¹⁶¹ *Id.* at 386–87.

cases as a “split double header” that “seems perversely designed to prolong the controversy and the litigation.”¹⁶² For instance, lawsuits could still challenge “whether, in the particular setting at issue, any educational benefits flow from racial diversity” and whether colleges and universities are genuinely committed to diversity if they permit race-specific student organizations, housing, and graduation ceremonies.¹⁶³ In Scalia’s view, the narrow tailoring requirement remained a constitutional minefield for colleges and universities that act on their commitment to diversity.¹⁶⁴ Whether Scalia’s dissenting opinion was a prophetic statement or a call to action, the aftermath of the Michigan litigation confirms that the public debate over racial preferences in higher education continues largely unabated.

A. How Compelling is Diversity After Grutter and Gratz?

After *Grutter* and *Gratz*, diversity is clearly a constitutionally acceptable justification for affirmative action in college and university admissions. However, the Court’s commitment to diversity stands in marked contradistinction to its call for corrective justice in *Brown*. There, the Justices spoke with one voice to admonish the nation that school desegregation was a moral imperative.¹⁶⁵ School districts that had engaged in past discrimination were obligated to eliminate its vestiges “root and branch.”¹⁶⁶ As a concession to political realities, the Court tempered its mandate by allowing districts to proceed with “all deliberate speed.”¹⁶⁷ Despite the obstacles to implementation, the Court did not waver in its belief that racially integrated schools were the normative ideal.

By the time the Michigan cases were decided, this unanimity and shared purpose had largely disappeared. Instead, there was shrill division among the Justices about whether diversity qualifies as a compelling interest. Even the majority in *Grutter* endorsed diversity as a pedagogical choice, not a moral imperative.¹⁶⁸ Precisely because institutions of higher education have not been found guilty of past discrimination, college and university officials are free to decide on a case-by-case basis whether affirmative action in admissions

¹⁶² *Id.* at 346, 348 (Scalia, J., dissenting).

¹⁶³ *Grutter*, 539 U.S. at 348–49 (2003) (Scalia, J., dissenting).

¹⁶⁴ *Id.* at 348.

¹⁶⁵ RICHARD KLUGER, *SIMPLE JUSTICE* 875–83 (1975) (describing Chief Justice Earl Warren’s commitment to generating unanimity in *Brown*).

¹⁶⁶ *Green v. County Sch. Bd.*, 391 U.S. 430, 438 (1968).

¹⁶⁷ *Brown v. Bd. of Educ.*, 349 U.S. 294, 301 (1955) (*Brown II*).

¹⁶⁸ *Diver*, *supra* note 7, at 717 (arguing that “the diversity argument rests on a weaker moral foundation” than a corrective justice argument).

produces educational benefits.¹⁶⁹ Still, the Court's diversity rationale continues to be shadowed by tacit corrective justice concerns. As much as the *Grutter* majority rests its decision on academic freedom and defers to expert judgments, the Justices wistfully hope for a colorblind future—if not in their lifetimes, then in those of the students. Yet, without a past wrong to rectify, the principle for imposing a time limit on affirmative action remains murky.

Stripped of the compelling imagery of corrective justice, the Michigan cases leave affirmative action in the uneasy space between constitutional law and constitutional culture. While constitutional law looks to the foundational text and judicial interpretation, "constitutional culture" consists of "the beliefs and values of nonjudicial actors" about "the substance of the Constitution."¹⁷⁰ *Grutter* struggles to reconcile constitutional law and culture through "the mysterious alchemy by which the historical dynamics of constitutional culture are transformed from merely external constraints on the legal judgments of the Court into the internal material of constitutional law itself."¹⁷¹ The *Brown* Court adopted gradualism as a concession to popular opposition to desegregation. With continuing resistance to racial preferences, *Grutter* has now incorporated the constitutional culture's ambivalence about affirmative action into the very texture of the opinion itself.¹⁷² In a conflicted jurisprudence of racial compromise, diversity can be a compelling interest if academics so decide, but race-conscious decision making also can be rejected as inappropriate. Academic freedom is the freedom to choose—at least for the next twenty-five years.¹⁷³

This constitutional formula for ambiguity and ambivalence leaves the legitimacy of affirmative action in higher education in doubt both empirically and politically. To the extent that diversity is a claim about efficacious pedagogy, its utility remains the subject of academic inquiry and disagreement. Consider, for example, Professor Richard Sander's critique of affirmative action in law schools and the reactions that it has engendered. Sander contends that affirmative action in legal education is not justifiable on pedagogical grounds because the programs actually harm rather than help black students.¹⁷⁴ The use

¹⁶⁹ Wendy Parker, *The Legal Cost of the "Split Double Header" of Gratz and Grutter*, 31 HASTINGS CONST. L.Q. 587, 607–08 (2003); Greene, *supra* note 38, at 282.

¹⁷⁰ Robert C. Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 8–9 (2003).

¹⁷¹ *Id.* at 76.

¹⁷² *Id.*

¹⁷³ See also Harry T. Edwards, *The Journey from Brown v. Board of Education to Grutter v. Bollinger: From Racial Assimilation to Diversity*, 102 MICH. L. REV. 944, 966–67 (2004); Frank Michelman, *Reflection*, 82 TEX. L. REV. 1737, 1741–48 (2004).

¹⁷⁴ Richard Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367, 371–72 (2004).

of racial preferences leads to an “academic mismatch” because blacks attend schools in which they are not academically competitive.¹⁷⁵ As a result, they are disproportionately concentrated at the bottom of the class, which in turn increases the likelihood that they will drop out or fail the bar examination.¹⁷⁶ Sander concludes that affirmative action actually reduces, rather than increases, the number of black lawyers because of these perverse effects.¹⁷⁷ The soundness of Sander’s statistical analysis has been attacked, but so far no one has rebutted his assertion that there is a racial achievement gap in legal education.¹⁷⁸ Nor has anyone carefully traced the impact of this gap on law school participation in classroom discussion, study groups, extracurricular activities, and informal social interchange in law schools.¹⁷⁹ In general, academic disengagement bodes poorly not only for the student’s performance but also for the vigorous exchange of ideas. The brouhaha over Sander’s study demonstrates that despite the *Grutter* decision, any assertion of diversity’s educational benefits is still open to empirical challenge.

Grutter creates an opportunity to bolster the evidence of pedagogical gains, but so far, there has been relatively little research on how affirmative action programs work to achieve a lively intellectual climate and peer-to-peer learning. To defend itself in the *Grutter* and *Gratz* cases, the University of Michigan commissioned a number of expert reports on the benefits of a diverse pedagogy because of the paucity of available literature.¹⁸⁰ Yet, as all law students know,

¹⁷⁵ *Id.* at 449–54.

¹⁷⁶ *Id.* at 426–48. For a discussion of the racial achievement gap in selective undergraduate institutions, see BOWEN & BOK, *supra* note 3, at 72–86; L. Scott Miller et al., Increasing African American, Latino, and Native American Representation Among High Achieving Undergraduates at Selective Colleges and Universities 2–11 (2005), available at <http://repositories.cdlib.org/issc/reports/>.

¹⁷⁷ Sander, *supra* note 174, at 472–75.

¹⁷⁸ See generally David Chambers et al., *The Real Impact of Eliminating Affirmative Action in American Law Schools: An Empirical Critique of Richard Sander’s Study*, 57 STAN. L. REV. 1855 (2005); Ian Ayres & Richard Brooks, *Does Affirmative Action Reduce the Number of Black Lawyers?*, 57 STAN. L. REV. 1807 (2005).

¹⁷⁹ For a preliminary effort to determine whether law school pedagogy in fact fosters diversity through a robust exchange of ideas inside and outside the classroom, see Moran, *supra* note 32, at 2279–94, 2301–21, 2329–42 (arguing that large, impersonal classes and rigid, traditional curricula as well as segregated study groups, extracurricular activities, and social relationships impede the dialogue that lies at the heart of a diverse pedagogy).

¹⁸⁰ STOHR, *supra* note 58, at 79–80; Eckes, *supra* note 38, at 50–51; Green, *supra* note 96, at 382–84. For descriptions of some of the research that was generated in conjunction with the Michigan litigation, see SYLVIA HURTADO ET AL., DEFENDING DIVERSITY: AFFIRMATIVE ACTION AT THE UNIVERSITY OF MICHIGAN (2004) (collecting work by Michigan faculty documenting the benefits of diversity); THOMAS SUGRUE ET AL., THE COMPELLING NEED FOR DIVERSITY IN HIGHER EDUCATION (1999); Patricia Gurin et al., *Diversity and*

research done in anticipation of litigation lacks the credibility of work done independently. Before the Michigan litigation, preliminary research conducted at Boalt Hall had suggested that a diverse student body can alter the institutional climate. Classroom discussions evolve differently, and student organizations and journals emerge that put race and ethnicity at the center of their agendas.¹⁸¹ By and large, though, colleges and universities have made little effort to capitalize on and document the benefits of diversity once the admissions process is over.¹⁸² Diversity programs that move beyond admissions seem especially important after the Michigan decisions. So far, perhaps out of a concern about ongoing opposition to race-based programs, few institutions of higher education have taken the lead in innovating in this area. Moreover, there has been relatively little evaluative research of existing efforts, although Professor Walter Allen, a sociologist and expert witness for the intervenors in the *Grutter* case,¹⁸³ is currently directing the Educational Diversity Project as part of a joint effort initiated by the University of North Carolina and the University of California at Los Angeles. The Project will explore first-year students' experiences with diversity in a law school setting.¹⁸⁴

With academics squabbling among themselves about the educational benefits of diversity, it should come as no surprise that affirmative action in college and university admissions remains as much a political as a pedagogical question. Before the Court decided the Michigan cases, three states—California, Washington, and Florida—had banned racial preferences in admissions.¹⁸⁵ After

Higher Education: Theory and Impact on Educational Outcomes, 72 HARV. EDUC. REV. 330 (2002); Patricia Gurin et al., *How Does Racial/Ethnic Diversity Promote Education?*, 27 W.J. BLACK STUD. 20 (2003).

¹⁸¹ Moran, *supra* note 32, at 2282–94, 2305–14 (describing impact of diversity on classroom discussion and student journals and organizations). Some witnesses also testified to the classroom impact of diversity in the *Grutter* and *Gratz* litigation. *Grutter* Brief for Respondents, *supra* note 103, at 26; *see also* STOHR, *supra* note 58, at 157–59.

¹⁸² Moran, *supra* note 32, at 2330–31, 2340–43; Institute for the Study of Social Change, *The Diversity Project: Final Report* 47–50, 59–61 (1991), *available at* <http://www.nacme.org/pdf/NR-StandingOurGround.pdf>.

¹⁸³ *See* Expert Report of Walter Allen & Daniel Solorzano, Professors of Sociology, UCLA, *available at* <http://www.bamn.com/doc/2000-expert-reports/00-er-wa-ds-1.pdf>.

¹⁸⁴ Email from Walter R. Allen, Director, Educational Diversity Project, and Meera E. Deo, Graduate Student, Department of Sociology, University of California Los Angeles, to Professor Rachel F. Moran (Jan. 19, 2005). Two books on research documenting the benefits of diversity did come out as a result of the interest created by the Michigan cases. DIVERSITY CHALLENGED: EVIDENCE ON THE IMPACT OF AFFIRMATIVE ACTION (Gary Orfield & Michael Kurlaender eds., 2001); MITCHELL CHANG ET AL., COMPELLING INTEREST: EXAMINING THE EVIDENCE ON RACIAL DYNAMICS IN HIGHER EDUCATION (2003).

¹⁸⁵ Jeffrey Selingo, *Decisions May Prompt Return of Race-Conscious Admissions at Some Colleges*, CHRON. OF HIGHER EDUC., July 4, 2003, at 55; Brad Knickerbocker, *Evolution of Affirmative Action*, CHRISTIAN SCI. MONITOR, June 24, 2003, at 1.

Grutter and *Gratz*, efforts were made to put an initiative to end affirmative action on the Michigan ballot.¹⁸⁶ This measure would be a direct rebuke of the Court's conclusion that university officials properly applied their expertise to find that diversity is a compelling interest. Not only would the proposed legislation end affirmative action, but it also would divest college and university administrators of the authority to resolve these matters.¹⁸⁷ The Court deferred to the unique tradition of academic freedom, but the politics surrounding the Michigan ballot initiative serve as a reminder that "freedom isn't free," especially at public colleges and universities. Initiatives to ban racial preferences largely dispense with arguments about educational benefits and instead emphasize fairness to individual applicants.¹⁸⁸ Even if the academy is uniquely suited to make pedagogical judgments, it has no monopoly on morality.¹⁸⁹ With the ambivalence and ambiguity inherent in *Grutter* and *Gratz*, Michigan's discretionary pursuit of diversity can readily be replaced by a popular mandate of colorblindness.

So far, federal civil rights agencies have done little to temper the empirical and political debates over affirmative action in higher education. In the wake of the Michigan decisions, no guidelines were issued to help colleges and universities craft admissions programs based on a diversity rationale.¹⁹⁰ Because each institution of higher education must weigh the costs and benefits of

¹⁸⁶ Eckes, *supra* note 38, at 55; Parker, *supra* note 169, at 609; Curt A. Levey, *Colleges Should Take No Comfort in the Supreme Court's Reprieve*, CHRON. OF HIGHER EDUC., July 18, 2003, at B11; Rebecca Tounson & Stuart Silverstein, *Bid to Export Prop. 209*, L.A. TIMES, July 8, 2003, pt. 2, at p. 1; Dana Milbank, *Affirmative Action Opponents Preparing for a Ballot Battle*, WASH. POST, July 4, 2003, at A7.

¹⁸⁷ See Lawrence Friedman, *Public Opinion and Strict Scrutiny in Equal Protection Review: Higher Education Affirmative Action and the Future of the Equal Protection Framework*, 24 B.C. THIRD WORLD L.J. 267, 279 (2004).

¹⁸⁸ Eckes, *supra* note 38, at 55.

¹⁸⁹ In explaining the effort to ban racial preferences in Michigan, sponsor Ward Connerly noted that it was important to send a message to key leaders that *Grutter* was "an aberration" that was "not consistent with where this country is or where it ought to be." Tounson & Silverstein, *supra* note 186. As a result, Connerly thought it imperative to take the issue of affirmative action "back to the people." *Id.*

¹⁹⁰ See Roger Clegg, *Time Has Not Favored Racial Preferences*, CHRON. OF HIGHER EDUC., Jan. 14, 2005, at B10; Peter Schmidt, *Affirmative Action Remains a Minefield, Mostly Unmapped*, CHRON. OF HIGHER EDUC., Oct. 24, 2003, at A22; *Standing Our Ground: New Report Offers Guidance for Enhancing Diversity in Science and Engineering, As Attacks on Minority Recruitment Threaten U.S. Competitiveness*, BUS. WIRE, Oct. 4, 2004, available at http://www.findarticles.com/p/articles/mi_m0EIN/is_2004_Oct_4/ai_n6220413 [hereinafter *Standing Our Ground*]. In the absence of federal guidelines, private organizations have shouldered the burden of generating information about how to comply with *Grutter* and *Gratz*. See generally *id.*

diversity on a case-by-case basis, federal agencies can argue that no uniform rules are appropriate. In truth, though, guidelines could offer a menu of options that reflect the most common policies and practices that schools are permitted to adopt. Certainly, this is the approach that the Bush administration has taken in elaborating on the availability of race-neutral options.¹⁹¹

In addition, enforcement agencies could take the position that because diversity programs are voluntary, colleges and universities should not be pressured to adopt them. Yet, advisory guidelines are designed to facilitate voluntary compliance, not to coerce the unwilling. Here, too, concerns about exerting undue pressure have not prevented agencies from offering extensive suggestions about how to substitute race-neutral options for affirmative action.¹⁹² In fact, the very notion that federal silence is appropriate because diversity programs are voluntary shows how far the jurisprudence of race has strayed from *Brown*. In the wake of *Brown*, federal agency action was critically important in making desegregation a reality.¹⁹³ Any retreat from vigorous enforcement of desegregation mandates was decried as a betrayal of racial justice.¹⁹⁴ Yet, in the absence of a clear and compelling mandate to make amends for past wrongs, the failure of federal leadership in implementing *Grutter* has not been widely condemned as an intolerable indifference to core constitutional values.¹⁹⁵

¹⁹¹ See *infra* notes 204–206 and accompanying text.

¹⁹² *Id.*

¹⁹³ J. HARVIE WILKINSON III, FROM *BROWN* TO *BAKKE*: THE SUPREME COURT AND SCHOOL INTEGRATION: 1954–1978, at 103–08 (1979).

¹⁹⁴ See, e.g., Gary Orfield, *Turning Back to Segregation*, in DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF *BROWN V. BOARD OF EDUCATION* 1, 4, 16–19 (Gary Orfield & Susan E. Eaton eds., 1996); Gary Orfield, *Toward an Integrated Future: New Directions for Courts, Educators, Civil Rights Groups, Policymakers, and Scholars*, in DISMANTLING DESEGREGATION, *supra*, at 331, 354.

¹⁹⁵ On the second anniversary of the *Grutter* decision, the NAACP Legal Defense and Educational Fund (LDF) wrote a letter to Secretary of Education Margaret Spellings, complaining that “rather than assist educational institutions striving to achieve [diversity], OCR is standing in the way.” Letter to Hon. Margaret Spellings, Secretary, United States Department of Education, from Theodore M. Shaw, Director-Counsel and President, NAACP Legal Defense and Educational Fund (June 23, 2005), *available at* http://www.naacpldf.org/content/pdf/gap/Letter_to_Education_Secretary_Spellings.pdf. In a report that accompanied the letter, the LDF noted that OCR had close ties to opponents of affirmative action, had created a hostile climate for programs through aggressive investigations, and “focused its energies on encouraging educational institutions to pursue race-neutral alternatives” rather than race-based preferences. NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., CLOSING THE GAP: MOVING FROM RHETORIC TO REALITY IN OPENING DOORS TO HIGHER EDUCATION FOR AFRICAN-AMERICAN STUDENTS 9–10 (2005), *available at* http://www.naacpldf.org/content/pdf/gap/Closing_the_Gap_-_Moving_from_

B. *Narrow Tailoring and the Interplay of Race-Conscious and Race-Neutral Remedies After Grutter and Gratz*

Though highly deferential in evaluating whether diversity is a compelling interest, the Court intervened decisively in determining whether Michigan's affirmative action programs were narrowly tailored. In this constitutional split double header, the Justices declared that a point system with a fixed weight for race is mechanistic and impermissible, while holistic review is constitutional precisely because individual assessments are flexible and contingent. Scholarly commentators have not been kind to this distinction. Even sympathetic observers like Robert Post have termed the requirement of holistic review "puzzling,"¹⁹⁶ and harsher critics have deemed the Court's approach little more than obfuscation.¹⁹⁷ In response to the decisions, schools that rely on affirmative action have been delegating the evaluation of applicant files to reviewers whose judgments are subjective, discretionary, and thus difficult to second-guess. This strategy has focused on refining the process of holistic review. However, the Court also indicated that colleges and universities should make a good faith effort to identify race-neutral alternatives before relying on affirmative action.¹⁹⁸ Despite federal efforts to promote these alternatives, colleges and universities have not paid as much attention to this part of the *Grutter* opinion. Even so, the Court's expressed preference for strict neutrality poses important questions about the future of race-conscious remedies.

The Justices' mixed message on the narrow tailoring requirement leaves considerable room for debate about the constitutionality of particular activities. The rejection of rigid, mechanistic approaches to affirmative action has laid the foundation for challenges to some race-conscious programs. In the wake of the Michigan decisions, the National Association of Scholars, the Center for Equal Opportunity, and the Center for Individual Rights began collecting information on policies and practices at state universities that arguably violate the narrow tailoring requirement.¹⁹⁹ Based on this factfinding, the Center for Equal Opportunity filed complaints with the Office for Civil Rights regarding state-run programs that are racially exclusive, such as minorities-only scholarships,

Rhetoric_to_Reality.pdf. It remains unclear what impact, if any, these protests will have on OCR's enforcement policies.

¹⁹⁶ Post, *supra* note 170, at 72.

¹⁹⁷ Michelman, *supra* note 173, at 1740.

¹⁹⁸ *Grutter v. Bollinger*, 539 U.S. 306, 339–40 (2003).

¹⁹⁹ Clegg, *supra* note 190, at 10; Eckes, *supra* note 38, at 55–56; Peter Schmidt, *Advocacy Groups Pressure Colleges to Disclose Affirmative-Action Policies*, CHRON. OF HIGHER EDUC., Apr. 2, 2004, at A26; Mary Beth Marklein, *College Admissions Examined*, USA TODAY, Mar. 24, 2004, at 7A.

internships, and summer activities.²⁰⁰ In general, colleges and universities have responded by opening up these programs to students of all races.²⁰¹ Ironically, as a result of these challenges, race-conscious programs are increasingly shifting in the direction of race-neutral ones, even though the Court endorsed the legitimacy of affirmative action.

There also have been complaints about admissions programs that allegedly employ quotas or set-asides. For instance, admissions policies at North Carolina State University, the University of Virginia, and the College of William and Mary all have been scrutinized for according excessive weight to race.²⁰² Even the Michigan law school policy remains the object of dispute. In critiquing affirmative action, Richard Sander has contended that law school admissions are the most heavily numbers-driven of any program in higher education. Based on a statistical analysis of admissions results, Sander found that race actually received more weight in the law school than in the undergraduate program at Michigan, and thus, the Supreme Court's decision elevated form over substance.²⁰³

Ongoing doubts about the narrow tailoring requirement might be resolved through federal guidelines or rules. So far, however, no federal agency has offered advice about tailoring admissions programs to meet the standards in *Grutter* and *Gratz*.²⁰⁴ Instead, the Department of Education's Office for Civil Rights has issued a lengthy report entitled "Achieving Diversity: Race-Neutral Alternatives in American Education."²⁰⁵ The report describes a range of race-neutral alternatives to affirmative action, including programs that seek socioeconomic diversity, percentage plans based on geographic diversity, and approaches that rely on comprehensive, individualized review without the use of racial preferences.²⁰⁶ In addition, opponents of affirmative action are touting the viability of race-neutral options. As part of its factfinding efforts, the National

²⁰⁰ Peter Schmidt, *Federal Civil-Rights Officials Investigate Race-Conscious Admissions*, CHRON. OF HIGHER EDUC., Dec. 17, 2004, at A26. The handling of these complaints prompted the National Association for the Advancement of Colored People's Legal Defense and Educational Fund to charge that the Office for Civil Rights is actively discouraging affirmative action programs deemed permissible in *Grutter*. See Peter Schmidt, *Report Criticizes Civil-Rights Office*, CHRON. OF HIGHER EDUC., July 1, 2005, at 18; *supra* note 195 and accompanying text.

²⁰¹ Clegg, *supra* note 190; Schmidt, *supra* note 190.

²⁰² Manning Marable, *The Death of Affirmative Action*, JACKSON ADVOC., May 20, 2004, at 5A.

²⁰³ Sander, *supra* note 174, at 404–05.

²⁰⁴ See *supra* notes 190–95 and accompanying text.

²⁰⁵ OFFICE FOR CIVIL RIGHTS, DEPARTMENT OF EDUCATION, *ACHIEVING DIVERSITY: RACE-NEUTRAL ALTERNATIVES IN AMERICAN EDUCATION* (2004).

²⁰⁶ *Id.*

Association of Scholars identified public institutions in several states, including Arizona, Connecticut, Iowa, Kentucky, and North Carolina, which report that they do not use racial preferences, even though they are legally permissible. According to the survey, all of these institutions have successfully diversified their student bodies, thus demonstrating that traditional affirmative action is no longer necessary.²⁰⁷

Demands for race-neutral alternatives in turn reveal the malleability of holistic review. The Michigan law school used a subjective, discretionary process to reduce the salience of race-based decision making. As a result, the Court agreed that the racial plus was not a quota.²⁰⁸ In a purportedly race-neutral system, contingent and individualized evaluation can mask the possibility that reviewers continue to give at least some weight to race. As a result, holistic review serves to blur the line between race-conscious and race-neutral evaluations, as a bill introduced in the California legislature shortly after the *Grutter* decision demonstrates.²⁰⁹ Under the proposed statute, the University of California and California State University would “seek to enroll a student body that meets high academic standards and reflects the cultural, racial, geographic, economic, and social diversity of California.”²¹⁰ To that end, the bill provided that “the University of California and the California State University may consider culture, race, gender, ethnicity, national origin, geographic origin, and household income, along with other relevant factors, in undergraduate and graduate admissions, so long as no preference is given.”²¹¹ The legislation was to “be implemented to the maximum extent permitted by the decision of the United States Supreme Court in *Grutter v. Bollinger*”²¹²

The bill’s supporters invoked *Grutter* explicitly in explaining why Assemblyman Marco Firebaugh introduced the legislation. As Firebaugh’s director of communications, Ricardo Lara, explained: “We felt the outcome was so inspiring that we need to make this available to all California students.”²¹³ The University of California took no position on the bill except to say that it

²⁰⁷ Clegg, *supra* note 190, at 10.

²⁰⁸ See *Grutter v. Bollinger*, 539 U.S. 306, 334 (2003).

²⁰⁹ A.B. 2387, California 2003–2004 Reg. Sess. (2004); see Kelly Paik, *Race Could Return to UC, Cal State Admissions*, DAILY CALIFORNIAN, June 3, 2004, available at <http://www.dailycal.org/particle.php?id=15406>.

²¹⁰ A.B. 2387, § 1 (amending § 66205(b) of the Education Code).

²¹¹ *Id.* (amending § 66205(c) (1) of the Education Code).

²¹² *Id.*

²¹³ Margret Gonzales, *Assembly Approves Use of Race in UC System Admissions*, THE UCSD GUARDIAN, June 3, 2004, available at http://www.ucsdguardian.org/cgi-bin/print?param=news_2004_06_03_02.

would not overrule Proposition 209.²¹⁴ Other organizations, including the ACLU, believed that the bill violated the statewide initiative banning preferences in admissions.²¹⁵ After the California legislature adopted the measure, the Governor vetoed it in September 2004.²¹⁶ The debate over the statute typifies the constitutional ambiguities at the heart of *Grutter* and *Gratz*. In a state that bans racial preferences, proponents of diversity still hoped to draw on *Grutter*'s endorsement of affirmative action. Through the subjective and flexible process of holistic review, race could somehow be considered without being given any weight. The blurring of the lines between race-conscious and race-neutral processes under the Court's constitutional split double header was complete.

Although *Grutter* and *Gratz* have prompted colleges and universities to move to a system of holistic review, there is little research on how best to predict student success by looking beyond traditional academic indicators to consider other personal traits.²¹⁷ Consequently, this approach often seems to involve, at best, educated guesses and intuitive judgments and, at worst, sloppy thinking and political subterfuge. So far, only a few scholars have attempted to broaden the criteria of academic merit in a systematic way.²¹⁸ Among these are Marjorie Shultz and Sheldon Zedeck, two Berkeley professors who are trying to formulate new measures for predicting lawyer effectiveness.²¹⁹ Their "ultimate goal is to develop admissions practices that are more valid than current ones"²²⁰ by creating a battery of tests to supplement traditional indicators like grades and LSAT scores. In the first phase of the research, Shultz and Zedeck identified dimensions of effectiveness, and in the second phase, they are testing predictors of effectiveness.²²¹ These predictors would look not only at intellect and cognitive skills but also at personality, situational judgment, and moral

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ CAL. DEPT. OF EDUC., 2004 VETOED K-12 EDUCATION LEGISLATION, AB 2387, <http://www.cde.ca.gov/re/lr/ga/vetoed2004.asp>; *Some of the 50 Bills Signed Into Law Thursday by Gov. Arnold Schwarzenegger*, INLAND VALLEY DAILY BULL., Oct. 1, 2004.

²¹⁷ Even in jurisdictions like California where public institutions have relied heavily on comprehensive review after racial preferences in admissions were banned, merit is still largely defined in traditional terms with only minor adjustments at the margin for other personal traits. Frances E. Contreras, *The Reconstruction of Merit Post-Proposition 209*, 19 EDUC. POL'Y 371, 384-85, 387-88 (2005).

²¹⁸ Transcript, *Who Gets In? The Quest for Diversity After Grutter*, 52 BUFF. L. REV. 531, 536-37 (2004).

²¹⁹ *Id.*

²²⁰ *Id.* at 543 (remarks of Professor Sheldon Zedeck).

²²¹ *Id.*

responsibility.²²² As difficult as developing new criteria undoubtedly will be, these groundbreaking efforts are important, for they demonstrate that attacks on current definitions of merit are not always thinly veiled demands for racial quotas.

If, as Lee Bollinger indicated, “the question is the next twenty-five years,”²²³ the early signs are not auspicious. In the aftermath of *Grutter* and *Gratz*, there is little evidence that academics or activists are teaching the inspiration of *Brown*. On the contrary, with corrective justice subordinated to a pedagogical rationale, debates focus on whether diversity works and whether affirmative action programs are narrowly tailored. Colleges and universities are sheltering themselves from litigation by punctiliously modeling their admissions programs on holistic review. Meanwhile, critics of affirmative action continue to challenge these practices as racially exclusionary and to question whether race-neutral alternatives have been exhausted. Given the institutional impulse to leave well enough alone, there has been relatively little research to document the impact of diversity, to rethink measures of merit, or to restructure curricular and extracurricular programs to promote peer-to-peer learning across racial and ethnic lines. In light of the Court’s tentative endorsement of diversity, it should come as no surprise that colleges and universities have yet to fully explore, document, and maximize the pedagogical benefits of including more than token numbers of students of color.

IV. THE NEXT TWENTY-FIVE YEARS

Each side in the Michigan cases had high hopes that the Court would resolve questions of affirmative action in higher education admissions once and for all. CIR wanted to put a decisive end to racial preferences, while civil rights advocates hoped for a clear endorsement of affirmative action programs. Some like Miranda Massie, lead counsel for the student intervenors in the law school case, saw the litigation in epic terms.²²⁴ Describing the lawsuits as a “referendum on racism and race in America,”²²⁵ Massie envisioned social transformation:

The victory in *Grutter* was a historic turning point. It was not sufficient by any stretch of the imagination, but it was necessary. . . . *Grutter* changed the possibilities for what we can do next. It gave the proudest and most progressive

²²² *Id.* at 546–49.

²²³ Bollinger, *supra* note 9, at 1595.

²²⁴ Miranda Massie, *Litigators and Communities Working Together: Grutter v. Bollinger and the New Civil Rights Movement*, 19 BERKELEY WOMEN’S L.J. 437 (2004).

²²⁵ *Id.* at 438.

traditions in United States history a living present and a living future. In that sense, the Supreme Court's decision is best regarded not as an end but as a beginning. It inaugurated a bright era of new and renewed struggles by the next generation of young civil rights leaders.²²⁶

Despite this hopeful admonition, diversity proponents still seem to be on the defensive. Because *Grutter* and *Gratz* balanced the legacy of the civil rights movement against the prospect of a colorblind future, the cases are at best a shaky bridge to an invigorated racial justice movement. Even after the Michigan decisions, the future of diversity remains doubtful, and the vitally important question for civil rights advocates is how to convert ambiguity into aspiration. So far, much of the affirmative action debate still turns on formalistic notions of equality. One side demands proportional representation, while the other insists on complete colorblindness. If scholars and activists truly want to revive the cause of civil rights, they must forge a new conceptual framework, one that rebuilds the connections between equality discourse and fundamental values of liberty, dignity, and membership.

By linking equal treatment to academic freedom, citizenship, and leadership, the *Grutter* decision provides a beginning, but its promise can be realized only by reimagining the ideals that will shape America's multiracial future. The reconceptualization of equality discourse can build on *Brown's* legacy. The Court's landmark desegregation decision grew out of a civil rights movement that emphasized freedom every bit as much as equality. There were Freedom Schools, Freedom Summers, and Freedom Rides.²²⁷ In mandating school desegregation, the Justices in *Brown* linked equal treatment to the freedom to develop one's potential through education. Later, the concept of equality became increasingly effete because it succumbed to formalities and abstractions. The quest for racial balance displaced the effort to show that equal access is an integral part of a well-functioning democracy. As a result, equality today is often wrongly portrayed as the enemy rather than the friend of freedom. In the higher education debate, for example, academic freedom is pitted against applicants' demands for equal treatment. In the popular parlance, colleges and universities choose between diversity and merit, between group representation

²²⁶ *Id.* at 442.

²²⁷ SANDRA ADICKES, *THE LEGACY OF A FREEDOM SCHOOL* (2005); SALLY BELFRAGE, *FREEDOM SUMMER* (1990); DOUG MCADAM, *FREEDOM SUMMER* (1988); JAMES PECK, *FREEDOM RIDE* (1962); Glenn T. Eskew, *The Freedom Ride Riot and Political Reform in Birmingham, 1961-1963*, 49 ALA. REV. 181 (1996); Len Holt, *Freedom Schools*, 9 SOUTHERN EXPOSURE 42 (1981); Daniel Perlstein, *Teaching Freedom: SNCC and the Creation of the Mississippi Freedom Schools*, 30 HISTORY OF EDUC. Q. 297 (1990); Mary Aickin Rothschild, *The Volunteers and the Freedom Schools: Education for Social Change in Mississippi*, 22 HIST. OF EDUC. Q. 401 (1982).

and individual fairness.

Grutter reconnects equality discourse to concerns about freedom and participation.²²⁸ As a result, the decision begins to create the vocabulary for thinking about core constitutional protections synthetically rather than in isolation from one another. Charles Black explains the virtues of a synthetic approach in enunciating fundamental human rights under the Constitution.²²⁹ Searching for a “reasoned constitutional law of human rights” and arguing that “[l]aw is reasoning from commitment,” he finds that one must rely on “an open-ended and open-textured” approach in interpreting key mandates and provisions.²³⁰ There are compelling arguments for just such an open-ended and open-textured approach when dealing with the struggle for racial equality. After a bloody Civil War, President Abraham Lincoln promised a “new birth of freedom.”²³¹ Congress clearly understood that no single principle, be it equal protection, due process, citizenship, or privileges and immunities, could suffice to build a foundation for true democratic participation. Instead, a powerful prescription built on all of these principles was needed to reconstitute our nation and return it to health.²³² The Reconstruction Amendments stand as a whole greater than the sum of their parts. In particular, unless the crafting of the Fourteenth Amendment is a mere exercise in juxtaposition, its provisions should be read together rather than parsed.²³³

There are those who doubt that a synthetic approach can succeed. It introduces too many complexities and begins to resemble the kind of responsive law that looks political rather than juridical, discretionary rather than rule-bound. As Philippe Nonet and Philip Selznick explain, responsive law “brings a

²²⁸ Greene, *supra* note 38, at 282 (arguing that *Grutter* can be read broadly as a case that calls for “full enjoyment of equal citizenship”); Karst, *supra* note 38, at 69–72 (contending that *Grutter* “looks to our national future” by requiring “equal citizenship, that is, full participation of all groups at all levels of the polity and the economy”).

²²⁹ See, e.g. CHARLES L. BLACK, JR., A NEW BIRTH OF FREEDOM: HUMAN RIGHTS, NAMED AND UNNAMED 5–6 (1997).

²³⁰ *Id.*

²³¹ NATHAN NEWMAN & J.J. GASS, A NEW BIRTH OF FREEDOM: THE FORGOTTEN HISTORY OF THE 13TH, 14TH, AND 15TH AMENDMENTS 2 (2004), available at <http://www.brennancenter.org/resources/ji/ji5.pdf>.

²³² *Id.* at 9–12. Even the prescription of the Reconstruction Amendments could not cure the country’s ills when the provisions were parsed in formalistic terms. See Cheryl I. Harris, *In the Shadow of Plessy*, 7 U. PA. J. CONST. L. 867, 899 (2005); Gabriel J. Chin, *Jim Crow’s Long Goodbye*, 21 CONST. COMMENT. 107 (2004) (describing the intransigency of Jim Crow legislation despite the Reconstruction Amendments); John A. Powell, *The Needs of Members in a Legitimate Democratic State*, 44 SANTA CLARA L. REV. 969, 995–96 (2004).

²³³ See Akhil Amar, *The Supreme Court, 1999 Term—Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 62–66, 68–74 (2000).

promise of *civility* to the way law is used to define and maintain public order.”²³⁴ In doing so, it bridges constitutional law and constitutional culture by declaring that:

[R]espect is the salient virtue. All who share a social space are granted a presumption of legitimacy. There is a commitment to widen the sense of belonging and to avoid attitudes and postures that read people out of the community. Standards of civility extend to the exercise of authority as well as to civic participation. At both levels, civility calls for a spirit of moderation and openness.²³⁵

Responsive law supports “a wider sharing of legal authority,”²³⁶ but in doing so, it sacrifices some of the sense of certainty and precision that the rule of law engenders. Part of formalism’s seductive appeal stems from its ability to generate clear-cut standards. Yet, even as great an admirer of legal order as Justice Benjamin Cardozo pointed out many years ago,

to determine to be loyal to precedents and to the principles back of precedents, does not carry us far upon the road. Principles are complex bundles. It is well enough to say that we shall be consistent, but consistent with what? Shall it be consistency with the origins of the rule, the course and tendency of development? Shall it be consistency with logic or philosophy or the fundamental conceptions of jurisprudence. . . . All these loyalties are possible. . . . [W]hen the social needs demand one settlement rather than another, there are times when we must bend symmetry, ignore history, and sacrifice custom in the pursuit of other and larger ends. . . . The final cause of law is the welfare of society.²³⁷

In short, simple rules and settled expectations sometimes must yield to a larger social vision of the good, in this case, the quest for racial justice.

Despite Michigan’s emphasis on *stare decisis*, *Grutter* not only relies on *Bakke*, but moves beyond it. Like *Bakke*, *Grutter* transcends formalism in pursuit of responsive law by tying equality concerns to liberty and participation. In recognizing that diversity is a compelling interest, the Court relates concerns about racial discrimination to claims about liberty, the academic freedom of institutions to structure learning environments that foster a robust exchange of ideas. This approach enables the Court to answer criticisms that undergraduate

²³⁴ PHILIPPE NONET & PHILIP SELZNICK, LAW AND SOCIETY IN TRANSITION: TOWARD RESPONSIVE LAW 90 (2001).

²³⁵ *Id.*

²³⁶ *Id.* at 95.

²³⁷ BENJAMIN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 64–66 (1921).

and graduate schools are engaged in promoting racial balance for its own sake. Under both *Bakke* and *Grutter*, broad access to higher education becomes a key component in the production and dissemination of knowledge.²³⁸ In fostering the development of ideas, college and university administrators must be free to bring their unique expertise to bear; they are, after all, in charge of the knowledge factories.²³⁹ Although strict scrutiny still applies because racial classifications are at issue, academic administrators need only show that they have adopted a beneficial pedagogical approach that minimizes reliance on race.

At the same time, *Grutter* moves beyond *Bakke* by elaborating the concept of critical mass in a way that avoids the rigid formalism of either colorblindness or strict racial proportionality. Critical mass is a flexible construct, precisely because it is a reasoned alternative born of responsive law. The concept links racial diversity and equality concerns to the speech interests of students as well as the academic freedom of institutions of higher education. A critical mass of students of color can learn unburdened by the stigma and isolation of being token presences on campus. Once on a sound academic footing, these students are emboldened to participate in a vigorous dialogue about ideas. Because this critical mass of underrepresented students can become full members of the campus community, all students enjoy the chance to share thoughts and experiences regardless of race or ethnicity. In short, critical mass balances the equality claims of applicants against the liberty interests and full membership of students who actually enroll.

Grutter moves even further beyond *Bakke* by acknowledging that the problems of balancing equality, liberty, and participation transcend the campus itself.²⁴⁰ The Court expressly recognizes that colleges and universities play an integral role in preparation for citizenship and civic leadership.²⁴¹ In determining whether racial preferences are appropriate, admissions officials can weigh the need to give students from all walks of life access to positions of power and influence.²⁴² The cultivation of future leaders is especially important at selective schools, the very places where concerns about diversity programs

²³⁸ *Grutter v. Bollinger*, 539 U.S. 306, 328–31 (2003).

²³⁹ For a description of the origins of the phrase “knowledge factory” to refer to colleges and universities, see STANLEY ARONOWITZ, *THE KNOWLEDGE FACTORY: DISMANTLING THE CORPORATE UNIVERSITY AND CREATING TRUE HIGHER LEARNING* 31–35 (2000).

²⁴⁰ Post, *supra* note 170, at 59–61; see also STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* 80–84 (2005).

²⁴¹ *Grutter v. Bollinger*, 539 U.S. 306, 331–32 (stating that law schools “represent the training ground for . . . our Nation’s leaders” and that “education is the very foundation of citizenship”) (internal quotations omitted).

²⁴² *Id.* at 332–33.

and reverse discrimination are most intense.²⁴³ As pipelines to positions of prominence, these institutions are vital to ensuring the legitimacy and efficacy of our democratic process.²⁴⁴ By invoking the leadership rationale, the Court links equality concerns to the imperative of full membership—not just in a college or university, but in the life of the nation. In doing so, *Grutter* anchors the notion of diversity even more deeply in a model of responsive law, with its widened space of belonging and community, than was true with *Bakke*'s strict focus on the campus learning environment.

By making plain the links between equality, liberty, and membership, some controversies, particularly related to the twenty-five-year timetable, can be clarified. Some scholars have chided the Justices for their naïveté in concluding that the racial achievement gap can be closed that quickly.²⁴⁵ This criticism presumes that affirmative action will end only when campuses can achieve proportional racial representation in a colorblind system. Yet, the Court does not demand proportionality—only a critical mass of students from underrepresented groups. It seems plain that critical mass can fall considerably short of racial balance.²⁴⁶ So, the Court's expectation is not necessarily unrealistic if more than token numbers of students of color can be enrolled without preferences in twenty-five years.

What is less clear is whether closing the racial gap for affluent youth would

²⁴³ According to a United Negro College Fund study, only 342 of 1,800 four-year colleges and universities practiced affirmative action, and only 120 were "serious affirmative action institutions." Karin Chenoweth, *Study Supports Contention That in Most Cases, Affirmative Action Does Not Deny Whites Access to Higher Education*, 14 BLACK ISSUES IN HIGHER EDUC. 10, 10–11 (1997). These latter institutions were in the "very top tier of competitive colleges and universities," and many expanded their classes to accommodate minority enrollment growth. *Id.* According to the study, black and Latino students enjoyed a significant advantage in the admissions process at these schools. *Id.*

²⁴⁴ *Grutter*, 539 U.S. at 332 (concluding that "it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race").

²⁴⁵ See, e.g., Kevin Johnson, *The Last Twenty-Five Years of Affirmative Action?*, 21 CONST. COMMENT. 171, 172–73 (2004) (describing an "instinctive reaction" that twenty-five years will not be sufficient to eliminate affirmative action because of intractable inequities in education); Daria Roithmayr, *Tacking Left: A Radical Critique of Grutter*, 21 CONST. COMMENT. 191, 207–08 (2004) (describing the twenty-five year timetable as "naively optimistic and at worst dangerously indifferent to the self-reinforcing dynamics of racial inequality" because "[n]o evidence exists to support O'Connor's expectation that the wide racial gaps in LSAT scores or GPAs will disappear before the year 2025.").

²⁴⁶ Parker, *supra* note 169, at 608; Eckes, *supra* note 38, at 52–53. Indeed, Michigan itself argued that this race-conscious admissions process was self-limiting because race and ethnicity would no longer be considered once critical mass was achieved without giving these factors any weight. Proof Brief for Defendants-Appellants at 46–47, *Grutter v. Bollinger*, No. 01-1447 (6th Cir. May 14, 2001).

suffice to yield a critical mass at elite colleges and universities.²⁴⁷ Presently, middle- and upper-income students of all races dominate these campuses, although affirmative action does yield some students of color from modest backgrounds.²⁴⁸ If socioeconomically advantaged students of color were able to compete without preferences, they would enroll in more than token numbers at selective colleges and universities. Critics might argue that these enrollments do not constitute a critical mass because some perspectives are absent when only privileged people of color attend. Moreover, if leadership is the rationale for diversity, democratic legitimacy is undermined when only the most affluent students of color have access to paths of power and influence.

On the other hand, low-income and first-generation college students are severely underrepresented among whites as well.²⁴⁹ Despite the relative invisibility of disadvantaged youth of all races on elite campuses, there has been little effort to enhance socioeconomic diversity to encourage the robust exchange of ideas across class lines.²⁵⁰ Nor have the bona fides of white graduates' civic leadership been questioned because the poor are excluded.²⁵¹ So, it is possible that the Court's vision of critical mass will be satisfied if privileged students of all races and ethnicities are academically competitive at selective institutions.²⁵² Should this prove to be the case, it will confirm some of

²⁴⁷ The gap in SAT scores between black and white testtakers declined steadily from 1975 through the late 1980s, and the narrowing of the gap was particularly pronounced for applicants to the most selective colleges. BOWEN & BOK, *supra* note 3, at 20–22. Unfortunately, there is some evidence that the overall racial gaps may widen in the coming years. *Id.* at 23. Even the difficulty of closing the gap for affluent students should not be underestimated. Despite the relative privilege of black students who enrolled at selective campuses, significant racial disparities persisted. The effect of socioeconomic status in reducing the difference was statistically significant but quite modest in size. *Id.* at 72–81.

²⁴⁸ Goodwin Liu, *Race, Class, Diversity, Complexity*, 80 NOTRE DAME L. REV. 289, 292–99 (2004). Currently, elite institutions of higher education like Michigan draw heavily from an affluent pool of applicants. Among all students at nineteen academically selective colleges and universities, only 10.8% of enrolled students came from the bottom income quartile and only 6.2% were first-generation college students. BOWEN ET AL., *supra* note 12, at 98–99. Even among underrepresented minorities, only 25.7% came from the bottom income quartile and 16.4% were first-generation college students. *Id.* at 107. In a study of twenty-eight selective colleges and universities, 86% of black matriculants were either middle- or high-income students, while only 14% were low-income. BOWEN & BOK, *supra* note 3, at 48–49.

²⁴⁹ BOWEN ET AL., *supra* note 12, at 163.

²⁵⁰ *Id.* at 175.

²⁵¹ *Id.* at 177–78, 193.

²⁵² Of course, critical mass would allay only the Court's concerns about racial equality. Left unaddressed would be daunting questions about whether a healthy democracy can

the fears that low-income blacks expressed at the inception of the post-World War II push for integration. They worried that the civil rights movement would benefit only the black bourgeoisie, who were best able to capitalize on newfound opportunities. The less affluent would be left behind, still poor, racially isolated, and powerless.²⁵³

Many commentators have wondered how the twenty-five-year timeline was selected. Some argue that it is entirely arbitrary, plucked out of nowhere and without any legal justification.²⁵⁴ Still others contend that this is the same amount of time that elapsed between *Brown* and decisions like *Milliken* that began to dismantle the desegregation remedy.²⁵⁵ Perhaps the timeframe was as much a safe harbor as a deadline, a way to ensure that *Grutter* would not be dismantled when its principal architect retired.²⁵⁶ Any one of these explanations is possible, or perhaps O'Connor simply chose this time span because *Grutter* came twenty-five years after *Bakke*.

If, however, equality claims are a means to ensure full membership and participation in the democratic process, there is a potentially intriguing (albeit speculative) basis for her choice. In its pleadings, Michigan made much of the fact that the United States has a demographic date with destiny. Diversity, according to this argument, is necessary to prepare students to function in a society in which whites will no longer be the majority. This shift will take place during the careers of young people currently enrolled in the undergraduate and law school programs.²⁵⁷ If the Justices took these claims seriously, the twenty-five-year timeframe could be linked not just to the narrowing of the achievement gap but to the day when the underrepresented will be poised to exercise political clout.

In twenty-five years, political remedies may no longer seem like a sham alternative to judicial protection. Assuming that effective leadership has been

survive with deep class divisions.

²⁵³ See Derrick Bell, *Serving Two Masters: Integration Ideals and Client Interest in School Desegregation Litigation*, 85 YALE L.J. 470 (1975); see also Edwards, *supra* note 173, at 967–69 (noting that “[o]bviously, *Grutter* does not purport to address the problems of the black underclass. Indeed, the ideal of diversity, as it is discussed in *Grutter*, is largely irrelevant to the significant number of African Americans who now suffer the worst effects of poverty, poor housing, crime-infested neighborhoods, unemployment, and low quality public education.”).

²⁵⁴ See, e.g., Johnson, *supra* note 245, at 172 (describing the twenty-five-year timeline as coming “out of the blue” in *Grutter*).

²⁵⁵ See, e.g., Michelle Adams, *Grutter v. Bollinger: This Generation’s Brown v. Board of Education?*, 35 U. TOL. L. REV. 755, 771 (2004).

²⁵⁶ This explanation took on newfound force when Justice O’Connor announced her intention to retire two years after *Grutter* was decided. See, e.g., Jeffrey Rosen, *Supreme Modesty*, N.Y. TIMES MAG., July 24, 2005, § 6, at 13.

²⁵⁷ *Grutter* Brief for Respondents, *supra* note 103, at 25.

built through diversity programs, communities of color will be prepared to assume their rightful place in civic affairs. Once dangers of majoritarian overreaching have been dispelled in a multiracial democracy, the Court should be able to relinquish its role as a special guardian of minority interests. Moreover, at this point, the dangers of reverse discrimination against a white minority become a real political concern, as O'Connor herself noted in an earlier affirmative action case.²⁵⁸ Although there is no way to verify this interpretation, the Court's explicit recognition of changing circumstances is consistent with the dynamic nature of responsive law.

V. CONCLUSION

The Michigan cases, although important landmarks, will not end the debate over diversity in higher education. Whatever the parties' hopes for a decisive victory, the Court could not invoke bright-line rules and formalistic solutions. The abstractions of colorblindness ignore the real-world reality of race, while strict racial proportionality seems little more than a concession to interest-group politics. By linking equality discourse to liberty and membership, *Grutter* begins the hard work of making law responsive to the core values of a healthy democracy. *Grutter* reminds us of the inspiration behind *Brown*, so that we can teach it and live it. Because the majority in *Grutter* adopted a flexible approach to evaluating affirmative action in admissions, the decision can be decried as pure politics rather than high principle. In truth, though, racial justice is not the product of iconic and exceptional cases, but a shared and ongoing responsibility. The American people must tackle the challenges of defining equality in light of this country's age-old struggle for dignity, freedom, and belonging. By embracing responsive law, *Grutter* wisely reminds us that neither the constitutional law nor the constitutional culture can shirk this responsibility.

²⁵⁸ *City of Richmond v. Croson*, 488 U.S. 469, 492, 510 (1989) (plurality opinion) (citing dangers of racial politics when blacks made up about fifty percent of the local population and held five of nine seats on the city council); cf. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 170–72 (1980) (arguing that affirmative action should not trigger strict scrutiny because a white majority conferred a benefit on minorities; reverse discrimination against whites as a class was not a serious concern because they could protect themselves in the political process). Of course, a numerical minority is not automatically a vulnerable political minority. For instance, if whites vote in disproportionately high numbers and make the lion's share of campaign contributions, their interests still could be protected at the ballot box. Moreover, if nonwhite groups fail to form effective coalitions, they might not wield majority power.

